No. 86

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

UNITED STATES OF AMERICA, *Appellant*

v.

THIRD NATIONAL BANK IN NASHVILLE, NASHVILLE BANK AND TRUST COMPANY AND WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY, *Appellees*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

BRIEF OF APPELLEE, WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY

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QUESTIONS PRESENTED

1. Whether on the basis of the record in the court below and on the law as interpreted by this Court to date, there is substantial evidence to support the district court's conclusion that the instant merger did not have a substantial anticompetitive effect; and whether, even assuming a substantial anticompetitive effect, the benefits to the community did not clearly outweigh such effect.

2. Whether, in enacting the Bank Merger Act of 1966, the Congress directed the courts to consider the effect of a merger upon competition, not only in commercial banking, but among financial institutions generally.[1]

3. Whether, when viewed in its entirety, the Bank Merger Act of 1966 liberalizes the competitive test to be used in assessing the validity of a bank merger.

STATEMENT

The Proceedings

On March 12, 1964, Third National Bank in Nashville (TNB) and Nashville Bank and Trust Company (Trust Company) agreed to merge. On April 27, 1964, they applied to the Comptroller of the Currency for approval of the transaction as required by the Bank Merger Act of 1960, 74 Stat. 129. Advisory reports on the competitive effect of the merger were sought by the Comptroller from the Federal Reserve System, the Federal Deposit Insurance Corporation, and the Attorney General.

Although it is not disclosed that any of these agencies (other than the Comptroller) conducted a field investi-

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[1] The appellant has mistakenly stated that the appellees have not challenged the district court's finding that commercial banking was the appropriate line of commerce within which to measure this merger. (Appellant's Brief, p. 21) In its Motion to Affirm, the appellee, Comptroller of the Currency, reserved the right to question the district court's limitation of the relevant market to "commercial banking" and the geographic area to Davidson County. (p. 14, fn. 23) It was believed that this Court could have granted said Motion to Affirm without the necessity of ruling specifically upon the "line of commerce" question. Accordingly, a portion of this brief shall be devoted to an exposition of this point.

gation of the merger, each submitted reports indicating that the merger would have some degree of adverse effect upon competition. (GX-498, R. 960; GX-497, R. 954; GX-496) The Attorney General's report, as noted in the appellant's brief at p. 4, stated that the merger "would significantly *increase the marked tendency toward oligopoly existing in the area generally.*" (Emphasis supplied.)

The Comptroller, following a field investigation (INX-6; INX-9) and a personal review of the deteriorating condition of the Trust Company, including additional information obtained by him from the banks at the request of the appellant, authorized the merger. The lack of an on-the-spot investigation by the other banking agencies; the fact that, for years, the Justice Department advisory opinions, had, without exception, labelled every bank merger proposed to the Office of the Comptroller of the Currency as having "adverse" or worse competitive effects (TR 3325, 3326, 3337; and Justice's noting of a "marked tendency toward oligopoly" in a market which had but one merger in thirty years and which contained as many independent banks *after* the merger as it had in 1950, were all considered in assessing the weight to be given the opinions. After studying the relative conditions of both banks; the advice of the Superintendent of Banking of the State of Tennessee, who had direct supervisory authority over the Trust Company, to the effect that competition would not be affected adversely (INX-8; R. 1261); and each of the criteria specified in the Bank Merger Act of 1960, the Comptroller authorized the merger on August 4, 1964 as being in the public interest.

On August 10, 1964 this action, alleging that the proposed merger would violate Section 1 of the Sherman Act and Section 7 of the Clayton Act, was filed by the appellant. A motion for preliminary injunction was argued by the appellant on August 14, 1964, and on August 18, 1964, the motion was denied and the merger was consummated.

The Facts.

Much of the material introduced into evidence during the trial of this case had previously been presented to the Comptroller of the Currency in support of the merger; it had proved sufficient, prior to trial, to convince the lower court that the public interest would best be served by permitting the immediate consummation of the merger.

The Office of the Comptroller of the Currency was also aware of the deterioration of the Trust Company's condition after its sale by the Hill interests to the Weaver group and subsequent to the agreement to merge. By the time the instant merger was approved, the Trust Company's position was such that an immediate consummation appeared essential to prevent a serious drain upon the resources of the institution.

A small bank which has agreed to merge is frequently subjected to "raids" on both personnel and accounts. (TR 3368). Such was the case with the Trust Company. (Fdg. 127, R. 131). As has been noted in the appellant's brief, the Trust Company was beset with numerous and substantial operating and asset problems prior to the merger agreement. By the time this case was

filed, there had been superimposed upon these problems the following facts:

(1) Three men were responsible for the growth of the Trust Company in the 1950's: H. G. Hill, Jr., the chairman of the board; W. S. Hackworth, its president; and Kirby Primm, the only full-time business development officer employed by the Trust Company. (Fdg. 115, R. 129)

(a) The president of the bank was seriously ill and had announced his intention of retiring (R. 368; R. 493; Fdg. 129, R. 131);

(b) H. G. Hill, Jr., had resigned his position as chairman in order to devote more time to his grocery business (R. 37); and

(c) Kirby Primm had left the employ of the Trust Company and had accepted a position with First American National Bank, the largest bank in Nashville. Within a very short period, Primm was instrumental in removing approximately $2.6 million in accounts from the Trust Company to First American. (R. 277; TR 775-776).

(2) The lack of leadership and of experience by the new owners further aggravated an already serious management problem. (R. 509-510; R. 539)

(3) The loss of the chairman of the board; the impending loss of the president, and the superannuation of the remaining officer staff, together with the deterioration of the loan portfolio of the bank rendered the merger in the public interest. (DX-15; R. 1217; Fdg. 131, R. 132; Fdg. 273, R. 153)

The case presented by the appellant was restricted primarily to a presentation of statistics for a nine year period commencing with 1955, the year in which W. S. Hackworth assumed the presidency of the Trust Company. Hackworth attempted to build up the commercial banking business of the firm (TR. 339-340); he was remarkably successful in increasing the amount of deposits until 1960. At that point, the evidence is uncontradicted that the Trust Company began to stagnate. Its rate of growth in the last four years of its existence was substantially under that of the preceding five years; and it was less than any other bank in Nashville. (Fdg. 229, R. 146)

Moreover, the Trust Company's growth was deceptive. The record is clear that much of it stemmed from the ability of Hackworth, a well-known and respected community and business leader, to convince his personal friends to deposit funds in his bank. The appellant's own witness, Kirby Primm, testified that the bank had leveled off in its growth in 1960 or 1961. He explained that:

> You can do so much on friendship. You can get so many complimentary accounts. They all have got friends. I would say the rest of it boiled down to convenience. Complimentary accounts—like I say, we all have friends. You can get complimentary accounts; you can get complimentary bank balances. But you can just go so far on friendship, and that's all. (R. 273)

In addition to Hackworth's personal position in the community and the willingness of friends to assist, the Hill grocery store connection was utilized to obtain Trust Company accounts. The method by which sup-

pliers were persuaded or coerced to deposit in the Trust Company in itself had some serious antitrust implications. The following testimony from the Trust Company's only full-time business solicitor, appellant's witness, illustrates this method of securing deposits:

> Q. You indicated, I believe, in your direct testimony that you used some kind of leverage in the Hill accounts. Can you describe precisely what you meant by that?
>
> A. Yes, sir. My approach would be like this. "Mr. Hill owns the bank; he is spending a substantial amount of money with you. If he is good enough to spend money with you, why can't you do some banking with us?"
>
> Q. Did you ever indicate to a customer that he might lose the Hill Company as a customer if he didn't deposit with the Nashville Bank and Trust Company?
>
> A. I am just thinking. I don't know whether I did or not, but I would have liked to, at times.
>
> Q. Did you ever imply that to a customer?
>
> A. I could have, yes.
>
> * * * * * * *
>
> A. Did you ever indicate to a supplier that if he deposited with Nashville Bank and Trust or did business with Nashville Bank and Trust Company that his products might have a place of preference on the Hill Corporation's store shelves?
>
> A. Yes, sir.
>
> [R. 272]

The growth of the Trust Company subsequent to 1960 was not due to the normal and healthy competition in which appellant would have us believe the bank engaged. For example, a five million dollar increase in 1960-61 was due to a large increase in state and federal deposits (52 per cent of the total). (R. 274)

In subsequent years, the bank's relative position in Nashville deteriorated,[2] and its percentage of the total banking business in Nashville declined from 5.72 per cent on June 30, 1960 to 4.83 per cent on June 30, 1964 (Fdg. 134, R. 132).

Finally, the condition of the Trust Company was made to appear substantially better by the use of a practice known as "window dressing." The dates on which regulatory agencies called for reports of condition from banks[3] were reasonably predictable. When a call was due, Hackworth would make a special request of friends for an additional large deposit for a period of a few days. These deposits would inflate the bank's deposit figures, making it appear to be in much better condition than it really was. (R. 650) The Trust Company was the only bank in Nashville which resorted to this practice. (Fdg. 214, R. 144)

The foregoing demonstrates the base of the Trust Company's deposit structure. It was a growth which had to end when Hackworth's friends could no longer be relied upon for additional sums, as finally happened in 1961; and it was a deposit structure which would have disappeared when Hackworth died and the personal bond no longer existed.

Similarly, the sale of the bank by the Hill interests and the resignation of H. G. Hill, Jr., from the chairmanship of the Trust Company rendered the deposits from grocery store suppliers too potentially volatile to

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See footnote 2 on opposite page.

[3] Substantially all of the statistics introduced in this case were based upon the data supplied by banks to regulatory agencies in reports of condition (call reports).

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In United States District Court

Defendant's Exhibit No. 34

**Growth of Total Assets of Commercial Banks in Davidson County, Tennessee
June 1956 to June 1960, and June 1960 to June 1964**

Name of Bank	June 1956	June 1960	June 1964	Percentage Gain 1956-1960 (First Period)	Percentage Gain 1960-1964 (Second Period)	Difference in Percentage Gain Between First and Second Period
	(In thousand of dollars)					
Third National	$191,061	$238,792	$ 357,111	24.98%	49.55%	+24.57%
Nashville Bank and Trust	28,844	42,272	50,863	46.55%	20.32%	−26.23%
First American National	232,837	283,866	407,248	21.92%	43.46%	+21.54%
Commerce Union	127,812	153,500	225,534	20.10%	28.35%	+ 8.25%
Broadway National*	20,894	22,213	......	6.31%	......	......
Capital City	......	3,673	9,073	......	147.02%	......
All Other in Total	6,839	8,831	13,006	29.12%	47.23%	+18.11%
Grand Total	$608,287	$753,147	$1,062,835	23.81%	41.12%	+17.31%

* Data for Broadway National are year-end data. Broadway National merged with Commerce Union in 1962. Percentage gain for Commerce Union during 1960-1964 period includes Broadway data for 1960 in base for calculation.

Source: Exhibit 1001 of Justice Department for all banks other than Broadway National; Moody's *Banking and Finance Manual* for Broad National.

Compiled by: Dr. Olin S. Pugh and Charles W. Cook, Jr.

be relied upon. The departure of Hill from the board, and Primm to a competitor resulted in an immediate loss of almost $2.6 million in accounts. (R. 277; TR. 775-776)

The appellant relied upon the demand deposits of individuals, partnerships and corporations (IPC) as being a factor demonstrating the day by day activity of the bank. (TR. 482) The IPC demand deposits of the Trust Company hit a peak in June, 1960. Never again during its exisence was the Trust Company able to reach its 1960 level in this statistically critical deposit category. (GX-1004, R. 1160; Fdgs. 230, 231, R. 147) It was the only bank in Davidson County to show an absolute dollar decrease in this category between 1960 and 1964. (Fdg. 133 (a), R. 132)

The "growth" of the Trust Company was not only deceptive; it was unhealthy. The various factors which convinced both the Comptroller and the court below that the Trust Company was not a significant competitor in commercial banking and that it had neither the ability or potential to become a competitive factor also demonstrated the total inability of the bank to meet the pressing needs of the community it should have served.

Deposits must be utilized through investments or loans. The greater the deposits, the greater the pressure to deploy them—for an idle deposit costs money. Trust Company, however, had not equipped itself to become an aggressive, or even adequate, lending institution. Despite the increase in deposits, the bank had not hired a college graduate in its banking department in five years. (R. 712) It did not have a single qualified

loan officer. (R. 707) Its credit files were in the heads of its officers and otherwise non-existent. (R. 715)

Although about 40 per cent of its loan portfolio was in long term mortgages (Fdg. 287, R. 155), its mortgage ledgers were kept in pen and ink. (TR. 792) The Trust Company had no continuous internal audit (Fdg. 93(b), R. 126); indeed, the lack of a continuous auditing system led to substantial defalcation. (R. 666-667) There was absolutely no audit of trust securities. (Fdg. 156, R. 136)

The bank had but one branch in an area marked by aggressive branching, even by Capital City Bank, less than one-fourth the size of the Trust Company. (Fdg. 74, R. 123) The lack of branches served as a serious handicap in the development of new accounts (R. 273, 274); the lack of a computer and of automated equipment made it impossible for the Trust Company to service any local industry or commercial enterprise, such as Avco, which utilized a computer or IBM cards in the preparation of a payroll. (R. 277, 278)

These various shortcomings were compounded by a management which was, at best, weak and inept. (R. 796) There had not been a change of department heads in twenty years. (R. 697) Because of age (Fdgs. 140, 141, R. 133; R. 436; R. 499), lack of genuine commercial banking experience, a reluctance to hire (R. 569) and failure to advance and retain younger men (R. 276; R. 696; R. 698; R. 758), (or an inability to

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[4] The Trust Company was the only bank in Davidson County to maintain such a large mortgage portfolio. The prime need of the area was commercial lending; the Trust Company was not equipped to handle commercial transactions. (TR. 2292)

do so because of an inadequate salary structure which, for employees, was lower than any of the other banks in Davidson County (Fdg. 138, R. 133) and the lack of a funded pension plan (Fdg. 139, R. 133)) the condition of the bank deteriorated seriously in the last four years of its existence. The number of loans classified as "substandard," "doubtful" or "loss" by examiners of the Federal Deposit Insurance Corporation increased from 3.7 per cent in 1960 to 6.8 per cent of total loans in 1963. (Fdg. 173(c), R. 138) For comparison, during the same period, Third National's classified loan percentage decreased from 2.1 per cent to .7 per cent. (INX-59, R. 1356) The Trust Company's classified loans increased from 67.7 per cent of its bad debt reserve in 1960 to 145.4 per cent in 1963 ((INX-59, R. 1356); Third National's classifications decreased from 57.8 per cent of its bad debt reserve in 1960 to 17.2 per cent during the same period. (INX-60, R. 1357)

The F.D.I.C. rating of the Trust Company was downgraded, in 1962, from "Satisfactory" to "Fair." (Fdg. 279, R. 153)

The record is also clear that the Trust Company was guilty of condoning illegality in its administration of trust funds. It permitted a cemetery association to deposit, in lieu of cash and in contravention of state law, unsecured promissory notes of the controlling stockholder into a perpetual care fund required by law. In addition, it permitted funds in various trusts related to said cemetery care to be used for speculative and self-dealing transactions by one of the principals of the association, with the substitution of speculative assets instead of those which would qualify

as trust investments under the "prudent man" rule: This situation existed for an indeterminate period prior to the merger; it was sharply criticized by the F.D.I.C. trust examiner. (Fdgs. 152-159; R. 134-136):

> These accounts have been a matter of criticism over a period of several examinations, with successive promises and programs of correction. Although the management expresses strong concern over existing conditions, *it must be recognized that the criticisms involved continue to expand,* which result lends strong support to the conclusion that either the matters are taken lightly or are not susceptible to correction. (Emphasis supplied.)
>
> (INX-22, R. 1336)

Utilization of Deposits

No witness disagreed with the proposition supported by the appellant's expert (TR. 3745) that the primary function of a commercial bank is commercial lending. (Fdgs. 283, 286, R. 154) One of the most accurate indicators of a bank's utilization of its deposits—which, after all, belong to the depositors in the community—is the ratio of loans to deposits. (R. 731) In a capital-deficit area, such as Nashville and the Central South (Fdgs. 204-207, R. 143), the greatest contribution a bank can render the economy is to lend its deposits in the commercial area to the maximum amount consistent with a soundness and sufficient liquidity. (TR. 178) A comparison of the respective performances of Third National and of the Trust Company demonstrates the greater capacity and willingness of Third National to serve the community. As of December, 1960, Third National was lending 56.99 per cent of its deposits, compared to 46.36 per cent for the Trust Company and 51.9 per cent for all banks in Davidson

County. Until the time of the merger, Third National's performance was superior, not only to that of the Trust Company, but to the average of all banks in the County.

LOANS TO DEPOSIT RATIOS

	Third National	*Trust Co.*	*All banks*
	Third National	Trust Co.	All banks
Dec. 1960	56.99	46.36	51.90
Dec. 1961	50.99	43.08	47.15
Dec. 1962	55.92	45.79	52.72
Dec. 1963	57.62	50.91	53.39
Dec. 1964	59.72	(1)	55.69

(1) Merged [DX-42. R. 1241]

The foregoing statistics, while an indicator of the sub-par performance of the Trust Company as compared to Third National and all Davidson County banks, do not adequately reflect the Trust Company's inability or unwillingness to engage in commercial lending. As 40 per cent of its loans were in long term mortgages and another 7 per cent in frozen classified assets, it is apparent that only about 26 per cent of its deposits were being used in commercial and consumer financing. The removal of $8.4 million in mortgages from the Trust Company's portfolio (Fdg. 282, R. 154; Fdg. 289, R. 155) and the clearing up of the Trust Company's classified assets ($1.5 million) by Third National (Fdg. 288, R. 155),[5] released a total of $9.9 million for more needed uses; the larger loan to deposit ratio of Third National, when applied to

[5] Computations from call report data contained in appellant's exhibits, R. 1158, R. 1159.

Trust Company deposits, resulted in an additional \$2.8 million being available to assist the local and regional economy (Fdg. 289, R. 155). When it is considered that total Trust Company loans at the time of merger were \$22.7 million, with only \$12.1 million of that in non-classified commercial and consumer credits, the addition of a total of \$12.7 million of Commercial lending power by virtue of the merger assumes enormous significance.

It was the opinion of the Office of the Comptroller that the Trust Company "had gone to seed." (GX-613, R. 1087; Fdg. 298, R. 157) The court below found that the facts which have been synopsized above were symptomatic of a bank without the will, desire or ability to compete in the growing industrial economy which is now characteristic of the Central South.

The internal condition of the Trust Company as evidenced in the trial, almost without contradiction by the appellant,[6] was such that a further deterioration or a continuation of its problems would have caused serious regulatory problems.

The condition of Third National, moreover, was never subject to question. Despite its insistence upon using the larger bank's examination reports, the appellant has never challenged the aggressiveness, the capability, the soundness, or the community and regional responsibility of Third National. Its examination reports were uniformly good (Fdg. 281, R. 154); it has served the community and the small businessman

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[6] Except for officers of the largest bank in town, which lost a \$2,500,000 interest-free deposit from the Trust Company as a result of the merger. (Fdg. 236, R. 147-148)

better than the Trust Company; and it ranks among the best-managed and soundest banks in the national banking system (Fdg. 281, R. 154). Its competence was demonstrated by its immediate correction, upon merger, of the asset problem of the Trust Company, and its replacement of the speculative trust assets previously referred to with more conservative and sound investments. (Fdg. 162, R. 137)

The lending expertise of Third National has enabled it to engage in which might be termed "marginal" lending which the Trust Company, with its lack of personnel, equipment, know-how, files, and credit department, could never engage in without seriously endangering its liquidity and soundness (Fdgs. 258-260, R. 150-151). The precipitous growth of questionable and classified loans in the Trust Company's portfolio is ample evidence that this bank could not have embarked upon a more aggressive lending policy without endangering its soundness. During the twenty months between the filing and trial of this case and despite an on-the-spot investigation by the F.B.I. and Antitrust Division personnel, the appellant was able to produce only two "marginal borrowers" who claimed that the Trust Company was able to accommodate them when a larger bank refused to do so. Both of these men, however, are being served today by one of Nashville's larger banks (Fdgs. 266, 267, R. 152). One admitted that he went to the Trust Company because of Kirby Primm; that he followed Primm to the largest bank in town; and that his banking relationships were personal rather than institutional (R. 864-865). The other had debts more than double his net worth; despite this,

a large Nashville bank was meeting his needs (Fdg. 266, R. 152). The appellant's theory that the Trust Company was able to meet the "marginal borrowers" needs was unsupported by the evidence.

The appellant's "marginal borrower" theory in the court below was supported only by one economist whose knowledge of banking was demonstrably superficial. As an example, he stated that a bank which makes unsound loans is contributing to the economic good of a community. (Fdg. 254, R. 150). It is apparent that a bank which dedicates itself to making unsound loans will ultimately fail; the appellant was apparently unable to find anyone else who believed that a failing bank constituted a community benefit. All other witnesses, banking and economic, refuted this contention. This "expert" refused to admit that an individual had any choice except to place his surplus funds in a demand deposit. (TR. 1071-1075) It was on the testimony of this type of witness that the appellant attempted to establish the product market and geographical area affected by the merger.

Essential to an assessment of the impact of this merger is a consideration of the correspondent banking system in the Central South. This is an area bounded by the Mississippi on the west; Louisville, Kentucky on the north; the Great Smoky Mountains on the east; and Birmingham, Alabama on the south (Fdg. 108, R. 128). Much of the territory encompassed by these boundaries is rural, although a major industrial expansion is in progress. Tourism, encouraged by the recreational facilities offered by the TVA system of lakes is becoming increasingly important.

A characteristic of the area, and specifically of Tennessee, is the restriction of bank branching to the county in which a bank is headquartered.[7]

Industry in the area has had a tendency to develop in the rural counties adjoining larger cities. As an example, Acme Boot Company, the world's largest manufacturer of boots, has its plants in counties ringing Davidson County (Nashville). (Fdg. 286, R. 154-155) The small banks located in these counties are of insufficient size to service the operational and credit needs of such industries. (TR. 1841, 1842) They are, moreover, too small to provide investment advice, trust department facilities, international trade services, and a host of the other services which are available at a full service bank. It is impossible, because of the law, for city banks to provide branches in such areas to meet the needs of the medium to large businesses located therein. Accordingly, the correspondent banking system has become an essential economic factor in the area. (Fdg. 97, R. 127)

It is customary for "country" banks to maintain a deposit with one or more large city banks. These deposits serve several purposes. First, they are sufficient in many instances to meet the reserve requirements of the smaller bank. Second, they afford a means whereby the seasonal surpluses of rural areas can be funneled into the industrial areas of the region to meet the ever-increasing credit demands of a burgeoning economy. Finally, from the city bank's viewpoint, they provide a welcome source of interest-free deposit. In return for the deposit, the country bank receives a

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[7] Tenn. Code Ann., Title 45, Ch. 2, § 45-211.

host of services from its city correspondent. The larger bank process and clears checks, and provides computer services for the smaller bank; it provides all of the services to the small bank's customer which the small bank is unable to perform, such as investment counsel, trust department and many others which require the resources of a large bank to be offered on an economically feasible scale. (Fdg. 97, R. 127; Fdg. 110, R. 128)

Most important, however, is the loan relationship between country and city bank correspondents. It operates in both directions. When the small banks in a larger bank's correspondent system have surplus funds available, they can be profitably invested in participations—a sharing of the larger banks loans. Conversely, when the small banks' customers' credit needs exceed the lending limit of the bank, the amount of the credit in excess of the limit is met by the larger bank. (Fdg. 106, 107, 108, R. 128) It is no exaggeration to state that a correspondent relationship is essential to the economy of an area served only by small rural banks.

Third National is one of the leading correspondent banks in the country, ranking 58th (Fdg. 106, R. 128) in the nation. About $66 million of its deposits are obtained through the correspondent system (Fdg. 108, R. 128); it was able, in 1965, to participate in more than $70 million in loans with its correspondents (Fdg. 108, R. 128)

The Tennessee-Central South area is extremely competitive. Banks in Nashville, Memphis, Knoxville, Birmingham, Chattanooga, Louisville, and other metropolitan areas including New Orleans and St. Louis

actively seek correspondent accounts in that region (Fdg. 99, R. 127). It is a hallmark of commercial banking in this region to engage in correspondent banking (Fdg. 101, R. 127); the Trust Company did not attempt to do so.[8]

The appellant, throughout the trial, maintained that the medium-sized bank is essential in a concentrated market because of its function as an innovator. Yet the record is devoid of evidence showing that the Trust Company ever introduced a new banking practice or service. The appellant's own expert witness admitted that there was no empirical evidence to substantiate this theory (R. 330-331).) Third National was an innovator; it had been the first to introduce many of the banking services now available in Nashville (Fdg. 91, R. 125).

Indeed, the Trust Company maintained balances with each of the three larger Nashville banks (Fdg. 166, R. 137), with First American retaining the principal balance. The Trust Company may well have been the best customer of each bank. (TR. 2546) First American cleared all Trust Company out-of-town checks, assisted in bond work, and occasionally helped with credit information (Fdg. 237, R. 148). Because of the balances maintained by the Trust Company with them, the larger banks tried to help the Trust Company by sending "split-account" customers to it. For the same reason, the large banks did not compete with the Trust Company. (Fdg. 244, R. 148-149)

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[8] The Trust Company was not a member of the Federal Reserve System. Membership in the System is a prerequisite for engaging in large scale banking. (Fdg. 95, R. 126)

In the final analysis, the appellant is forced to rely on two relatively insignificant items to demonstrate the "competitive" posture adopted by the Trust Company. In certain limited categories of checking accounts, its rates were slightly lower than Third National's (Fdg. 262, R. 151), although there was no attempt to compare its rates with other Nashville banks. However, Third National's charges were less than the average for all Nashville banks in all categories of deposit accounts. (DX-48, R. 1252-1254)

The second item was that the Trust Company had purchased a few newspaper ads to announce that it made direct auto purchase loans. Yet, as appellant concedes in its brief at p. 9, Third National made substantially more loans of the same type than did the Trust Company. Third National, unlike the Trust Company, also engaged in extensive dealer financing and floor planning (F. 253, R. 150) which enables dealers to maintain their business, to carry adequate stock, and to meet their payrolls. Third National concededly engaged in indirect auto loans, which give the purchaser the option of financing a car at the time and place of purchase if he so desires. This service does not deprive a customer of financing by direct borrowing from the bank; it gives him a choice. The Trust Company did not provide the public with this option. (Fdg. 253, R. 150) The appellant's own witness testified that any creditworthy person could obtain direct auto financing from any Nashville bank. (R. 869)

As appellant notes in its brief, the Trust Company had continued to show a profit. (App. Brief, p. 8) This profit was illusory, having been "squeezed" out of overhead. (R. 640) Employee salaries which were

lower, on the average, than the nationally recognized poverty level of $3,000 (TR. 3257); officer salaries lower than the larger banks in the county (Fdg. 136, R. 133); lack of a computer and automated equipment (Fdg. 181, R. 139); no funded pension plan (Fdg. 139, R. 133); virtually no internal audit procedures (R. 664-665; Fdg. 93(b), R. 126); no credit files (Fdg. 175, R. 139); no loan officer (R. 707; Fdg. 259, R. 151); only one branch (Fdg. 176, R. 139); and a need to staff from the bottom up and to replace top management in almost every department (R. 373; Fdgs. 129-131, R. 132; Fdgs. 140-143, R. 133), would have eliminated the profit (R. 418; R. 474; Fdg. 181, R. 139). Future profit would have remained low or would have been eliminated as the bulk of the needed expenditures would be recurrent. (R. 474-477)

All of the foregoing, most of which is uncontradicted in the record, forced the court below to conclude that the Trust Company was not a viable institution but a stagnant and floundering one. (R. 108) It could not compete; it lacked the personnel, the equipment, the know-how and the will to compete. Its absorption by Third National did not eliminate competition—as the Trust Company did not compete.

The resources of the Trust Company—both monetary and remaining personnel—are now at work throughout the Central South with more vigor than they had ever been before the merger. (TR. 2143) Trust Company employees have had their salaries upgraded to the level of Third National's employees. (TR. 2510; Fdg. 196(c), R. 142) Upon taking over the Trust Company's business, Third National found it necessary

to charge off $121,000 in bad loans. The remaining classified loans were either collateralized, renegotiated or, in one form or another, removed from the bank. (Fdg. 282, R. 154) At the time of the merger, Third National's classified loans, by dollar volume, despite the fact that it's loan volume was more than eight times larger than the Trust Company's, amounted to *less* than Trust Company total classifications prior to its merger. (INX-61, R. 1358)

Similarly, the potentially scandalous situation in the trust department has been rectified. (Fdg. 162, R. 137).

Third National has remodeled the Trust Company main office (Fdg. 197(a), R. 142); it has computerized and automated its accounts (Fdg. 196(d), R. 141), thus affording Trust Company customers faster and more reliable service. It has subjected Trust Company resources to continuous audit (Fdg. 197(g), R. 142). Trust Company customers have the entire branch system of Third National available to them, and they are using it. (Fdg. 196(c), R. 141; DX-14, R. 1215; R. 709-710).

The bank regulatory agencies have to assess a merger as it is at the time it is presented to them for approval. They are unable to speculate as to what might have been. The approval of this merger by both the Office of the Comptroller of the Currency and the court below was based, inter alia, upon the foregoing facts, which are but a brief summary of the findings of the District Court.

SUMMARY OF ARGUMENT

The argument herein is necessarily extended because of the issues raised by the appellant for the first time during this litigation.

Because of the insubstantiality of the issues raised in the second and third questions of the appellant, they are treated first.

These two issues border on the frivolous. The allegation that the lower court did no more than review the Comptroller's decision is patently absurd in view of the 3800 page record of a six week trial involving more than 600 documents and 47 witnesses, together with the court's own statement that it arrived at a conclusion "independently" and with the fact that only one of twelve conclusions of law related to the findings of the regulatory agency.

The second allegation—that the defendant had to prove a less anticompetitive means of accomplishing a necessary end—was not introduced as an issue before or during trial and is not properly before this Court. There is no evidence that any other qualified buyer existed who was willing to pay a fair price for the Trust Company or who had the competence to run the Trust Company. Moreover, even if the appellant's position on this issue were upheld, it would merely add to the burden of the defendants, for the 1966 Act authorizes substantially anticompetitive mergers if outweighed by the convenience and needs of the community.[9] If a "less anticompetitive" means existed, then the merger would have been more anticompetitive than it was, and the burden of outweigh-

[9] 12 U.S.C. 1828(c)(5)(B).

ing the anticompetitive effect would be heavier. In the instant case, no "less anticompetitive" means of resuscitating the Trust Company is in evidence, despite the existence of a twenty month period between the filing of the case and the trial during which appellant had every opportunity to find such a means if one existed. While a violation of the law is a violation, fair play should require that a defendant knows what he is being accused of. This appeal is the first notice to the appellees of this issue. It is not sufficient to allege that they should have anticipated it, for there were no facts or allegations presented which indicated the probability, or even possibility, of a "less anticompetitive" alternative.

It is urged that the Bank Merger Act of 1966 establishes a broader standard by which to measure the anticompetitive effect of a bank merger.

If the appellant should choose, in bank merger cases, to present bare statistical cases in support of its allegations, trusting that the situation might fall within the framework of the decision of this Court in *United States* v. *Philadelphia National Bank,* 374 U.S. 321, *and if no defense were introduced,* it must be conceded that the standards of Section 7 of the Clayton Act would apply.

The Court is urged, however, to view the Bank Merger Act in its entirety and to judge its intent by the initiators and supporters of the legislation rather than by the statements of its opponents. If this is done, and the "substantive rule of law"[10] contained in paragraph (5)(b) is considered in its entirety, it is apparent

[10] 12 U.S.C. 1828(c)(2)(b).

that Section 7 of the Clayton Act is the vehicle for the filing of a suit—but the 1966 Bank Merger Act sets the standards.

These standards, because of the omission of the phrase "line of commerce" from the carryover provisions of Clayton §7, and because of the intent of Congress in passing the new Bank Merger Act require a broader look at all the facts surrounding a merger.

The court below assessed the merger in this manner and found that the standards of *Columbia Steel* [11] best articulated the intent of the legislature in setting up the new competitive standard.

The appellee does not maintain that *Columbia Steel* must necessarily be reinstated *in toto* as applicable antitrust law; but it is submitted, that the "rule of reason" applicable to bank mergers, as noted by this Court in *United States* v. *First City National Bank of Houston,* 386 U.S. 361, is well articulated by the competitive test applied by *Columbia Steel.* The application of the "rule of reason" to the instant case results in the inescapable conclusion that the merger was justified.

The Trust Company was at best a declining institution. Its officer corps, unchanged in senior positions for twenty years (R. 697), was superannuated. It had no credit files (Fdg. 175, R. 139)—a serious commentary upon a bank's operation. It had no loan officer (R. 707; Fdg. 259, R. 151) and no credit follow-ups. (Fdg. 258, R. 150-151) Its classified (substandard to loss) loans doubled in one year. (INX-60, R. 1357)

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[11] *U.S.* v. *Columbia Steel Co.,* 344 U.S. 495.

Out of every $14 lent out, $1 was in danger of being or becoming uncollectable. (INX-60, R. 1357) It lacked a continuous audit (R. 664-665); and, despite its trust department's *public* reputation, there was *no* audit of its assets and its officers condoned illegalities and irregularities in trust administration. (Fdg. 156, R. 136)

Its growth—and this is not contradicted by any person who worked for or who had studied the bank—was due to personal friendships of the president (Fdg. 115, R. 129), business relationships of the chairman (Fdgs. 115, 116, R. 129), and coercion and/or preferential treatment of suppliers to the grocery chain which controlled the bank. (R. 272)

The Trust Company could not, would not, and did not compete.

Third National did. Appellant's own expert categorized it as a "wonderful" bank (R. 917). It was an innovator in offering services to the community. (Fdg. 91, R. 125) It is a leader in the correspondent banking business which is sorely needed by the region. (Fdgs. 97-99, 106-108, R. 127, 128)

It has utilized the Trust Company's deposits in commercial lending to the point that the *additional* sums available as a result of the merger exceed the *total* which the Trust Company used in this field.[12]

It has granted Trust Company employees salaries above the subpoverty level they "enjoyed" as employees of the Trust Company (Fdg. 196 (f), R. 142);

[12] See p. 15, infra.

it provided a funded pension plan for them. (Fdg. 196(f), R. 142)

These and many other benefits are enumerated herein. The decision of the district court is factually unassailable. Trust Company was not a major, significant, or substantial competitor, nor was there any evidence that it could ever become one. The appellant's case, therefore, consists solely of inferences to be drawn from statistics with no factual support—statistics so contrived that appellant's own counsel extracted from his own expert on redirect examination that his statistics could be made to "jump through hoops." (TR. 560)

Even if this narrow view of competitive ability or impact were to be adopted, the convenience and needs of the community to be served (and being served) by Third National clearly outweigh any anticompetitive effect the merger may have had. The public interest has been well served by the fact of the merger. No harm to the public appears in evidence, nor has the probability of harm at a future date been substantiated by anything or anyone other than a student economist who admitted no knowledge of a single fact in Nashville to support his theoretical conclusion.

Accordingly, this Court is asked to reaffirm the decision of the court below, with sole exception of its delineation of the "line of commerce." It is submitted that the legislative history of the Bank Merger Act of 1966 demonstrates that the Congressional intent was to supplant "commercial bank" as a line of commerce in bank merger cases by an assessment of competition among financial institutions. This substitution

permits a court to look beyond a mere statistical case into the actual management and competitive ability of a merged institution and to view, in the same context, convenience and needs of the community.

ARGUMENT

The Second and Third Questions Presented by the Appellant Have No Basis in the Record, Opinion, or Findings in this Case.

Before proceeding to the basic argument before this court—whether (1) competition was substantially lessened and (2) if it was, was that effect clearly outweighed in the public interest by the contribution of the merger to the convenience and needs of the community, it is necessary to dispose of two questions raised by the appellant which have no basis nor support in the record of this case.

The second question presented by the appellant is:

> 2. Whether in such an action the court should make an independent determination of the merger's legality or merely review the banking agency's determination to ascertain whether it is supported by substantial evidence.

In its brief, at p. 15, the appellant appears to have abandoned its reliance on this issue, but it is not certain that it has done so. The record is so clear, however, that the surprise is not that the issue may be abandoned but that it was raised at all.

Subsequent to the intervention of the Comptroller of the Currency in this case, but prior to its trial on the merits, the court below was urged to remand the entire matter to the Office of the Comptroller for review. As in the *Houston* case, the argument was advanced

that the Bank Merger Act of 1966 required specific findings by the Comptroller of the Currency as to the competitive effect of the merger and as to the result of the balancing test between such effect and the "convenience and needs" of the community to be served. When such findings would have been made, the court would be required only to determine whether the findings were arbitrary and capricious, or that they were supported by substantial evidence.

The District Court rejected this argument in *toto;* it held instead that the Comptroller, having intervened, was no longer acting as a quasi-judicial officer but as an adversary party.[13] At the beginning of the trial, the Court stated:

> After listening to these opening remarks, the only issue on which I have a definite opinion at this time, or at least on which I would like to indicate a definite opinion, is that it is my opinion that the Comptroller's position in this lawsuit is that of an adversary, advocate, or party, just like any other party.
>
> When he saw fit to move to intervene and did intervene, he ceased to be, for the purposes of this case, at least, the trial of this case, an administrative officer or quasi-judicial officer, and became an advocate.
>
> That's the way he would be treated in this lawsuit.

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[13] In his formal opinion, after the Comptroller had been subjected to cross-examination during the trial, Judge Miller noted at p. 83: (R: 90)

> Nor are the Comptroller's opinions expressed as a witness under oath entitled to any less weight because he saw fit to intervene as a party in the action. If he concluded that the merger met the tests of the 1966 Amendment as he obviously did, it was his right, if indeed it was not his duty, to intervene in the action to support that conclusion and to make his views, opinions and findings known to the Court.

> That does not mean to say, of course, that he could not present to the Court any view, opinion, or statement of fact or any evidence he desires to present in the same way that any other party could present evidence, make arguments, and so on.

The trial was then conducted in full conformity with the *Houston* decision, even though this trial ended before the *Houston* case was filed. The appellant was permitted to put in a case based solely on Section 1 of the Sherman Act and Section 7 of the Clayton Act. At no time did the appellant concede that the Bank Merger Act of 1966 was related in any manner to the trial of this action.

The rules of evidence were rigidly adhered to by the trial court. Convenience and needs, even insofar as they related to the competitive ability of the Trust Company, were treated solely as an affirmative defense. Neither the defendants nor the intervenor, appellees herein, were allowed to cross-examine the appellant's witness on any matter other than the competitive factors upon which they testified.

Following the completion of the appellant's case-in-chief, the defendants and the intervenor were allowed to present evidence upon the condition of the Trust Company, and upon competition among banks and other financial institutions located in Nashville and in the Central South. The appellant attempted by lengthy testimony to rebut the defendant's presentation. It is difficult with 3800 pages of transcript, 600 exhibits, and 47 witnesses involved in this six week trial, to understand how the appellant could suggest that nothing was involved in this issue but a review of the Comptroller's findings. It is almost impossible to comprehend what additional evidence could have been

presented to the court for its consideration in determining the legality of the subject merger. Curiously, there is no claim by the appellant that all of the data and testimony available to it was not made available to the court. The experience of the defendants and the Comptroller during the 20 months between filing and trial of this lawsuit, enabled facts which may not have been known or which did not exist at the time of the merger to be placed before the court for its scrutiny. Its opinion (R. 107-8) states:

> The Court concludes that the Comptroller of the Currency's findings, made both before and after the passage of the 1966 Bank Merger Act, that the anticompetitive effects of the merger are minimal and that the merger is not violative of antitrust standards, is supported by the clear preponderance of the evidence in the record. *As the Court is also of this view independently of the Comptroller's* findings, it is unnecessary to inquire whether any anticompetitive effects are outweighed by the convenience and needs of the community. However, *the Court is of the opinion* the preponderance of the evidence supports the Comptroller's findings that the convenience and needs of the community and the public interest will be far better served by Third National Bank with the additional assets which it acquired as a result of the merger than would be the case by maintaining the Trust Company as a separate institution. [Emphasis supplied.]

The court's findings of fact (R. 109, et seq.) are all independent findings of the court below and are based solely upon evidence which was introduced in the course of the trial. The court's conclusions of law nos. 6 through 11 (R. 163) are nowhere related to the findings of a regulatory agency. Finding no. 12 is obviously an

alternative to the independent findings of the court in that it notes that the preponderance of the evidence in the action (such evidence being substantial) supports the Comptroller's findings that the merger did not violate the antitrust standards of the 1966 Amendment and that any anticompetitive effects of the merger were clearly outweighed in the public interest by the convenience and needs of the community to be served.

The entire tenor of the district court's opinion, findings and conclusions evidences an intent to review independently all of the facts relating to the merger. The fact that the district court specifically stated that it had reached its conclusions independently clearly negated the validity of this issue raised by the appellant. To hold otherwise would subject to attack every case in which the trial court arrived at a conclusion which happened to agree substantially with the findings of the responsible agency. The appellant is apparently contending that if a district court agrees with the responsibile agency, it is merely "reviewing" the findings; to be independent a district court must disagree.

This posture is not consistent with this Court's position in the *Houston* case, in which it held:

> The courts may find the Comptroller's reasons persuasive or well nigh conclusive. But it is the Court's judgment, not the Comptroller's, that finally determines whether the merger is legal.[14]

The appellees do not challenge this statement as is implied by the appellant's question. We merely note

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[14] *Supra*, p. 369.

that the court below made its own study, arrived at its own findings (many of which were not articulated in the Comptroller's opinion or in his testimony) based solely upon evidence before the court; and rendered its own conclusions of law. That the findings of the court included one finding out of 12 that the preponderance of the evidence supported the more limited conclusions of the Comptroller is a rather insubstantial basis for a claim that the court merely "reviewed" the Comptroller's record.

The appellant's question no. 2, therefore, is improperly, if not frivolously, before the court and is completely without justification on the record in this case. The Court has already unanimously decided the legal issue in *Houston*[15] and the lower court, despite the fact that this case was tried and decided before *Houston* was decided, anticipated and adhered fully to the procedural rules set down in this Court's opinion.

It Is Not Necessary To Speculate as to "Less Anticompetitive" Alternatives to a Given Bank Merger

Appellant's question no. 3 states:

> 3. Whether the court may properly deem a bank merger's anticompetitve impact clearly outweighed in the public interest by its probable effect in meeting the convenience and needs of the community to be served, without finding that there was no reasonable probability of achieving the same benefits through means having a less anticompetitive effect.

The record below shows that only one other potential purchaser, Commerce Union Bank (the third largest in Nashville), evinced interest in purchasing the Trust Company. Preliminary discussions never reached the

[15] *Supra*, p. 369.

level of formal negotiations; the offer of Commerce Union was never seriously considered.

The appellant would require the defendant in each case to prove a negative—that no other purchaser was available. If adopted as a general principle, this position would wreak havoc in the ordinary conduct of business affairs—for who can say that any business contract could not have become "less anticompetitive" if the seller had sought out a weaker buyer. From a statistical point of view, Trust Company's merger with Capital City Bank, a $10 million Nashville institution, would have been "less anticompetitive." But to superimpose the problems of Trust Company upon the problems of the smaller bank (R. 308; TR. 876) would foreseeably result in a later merger to prevent the decine of the combined institution.

In the instant case, no other interested institution or investor was brought forward by the appellant, unless it is asking this Court to rule that the Weaver group had an obligation to sell at a price far below that which was apparently considered reasonable by the parties to this merger. Because of state law branching restrictions, no bank from outside the Davidson County limits could have merged with Trust Company. The appellant has not suggested the sale of Trust Company to persons not familiar with Nashville or the Central South. The only method by which the commercial and trust customers of Trust Company could have been assured of improved service by persons familiar with the area was by merger with a Nashville bank. Let us consider the alternatives.

Nashville's smaller banks, despite an aggressive competitive spirit, would clearly have been unable to absorb the Trust Company. Capital City Bank, the

fifth largest and fastest growing bank in the area, had serious problems in obtaining personnel to staff its own smaller operation (R. 308). How, then, could it have solved the immeasurably greater manpower problem of Trust Company? Accordingly, the merger had to be with one of the three larger banks.

A merger with the largest bank in Nashville, First American National, would presumably have resulted in a lawsuit such as the one now before this Court. The actual merger with Third National is obviously unsatisfactory to the appellant.

Commerce Union, therefore, is the *only* "less anti-competitive" means to which appellant can refer. Yet, this bank was not interested in meeting a fair price for Trust Company, nor has appellant suggested any method of forcing Commerce Union to offer more or to force the Trust Company owners to accept less. No attempt was made by appellant to prove that Commerce Union Bank was deep enough in managerial resources or otherwise able to handle the accumulated difficuties of Trust Company. As Commerce Union was not involved in this action, and the appellant did not introduce the issue during trial, the record is devoid of any facts going to Commerce Union's ability to absorb Trust Company.

Consider the description of Third National by the trial court:

> Only a brief word need be said concerning Third National and its position in the relevant market. There is no dispute in the record that it had been a strong, dynamic and aggressive bank, since its organization in 1927. It was characterized by the Comptroller of the Currency in his testimony at the trial as one of the strongest and best managed banks in the nation. Of particular sig-

nificance is the fact that its steady and impressive growth between 1927 and 1964 had been entirely the result of internal expansion, having no prior history of acquisition of assets by merger or consolidation. It had, in addition to its main office, some 14 branch offices in Davidson County. It has been active in the correspondent banking field, having approximately 365 correspondent bank accounts prior to the merger, most of which are located within a radius of 250 miles. Prior to the merger in 1964, it had total deposits of $315,090,000.00 as contrasted with the largest bank, First American National, with deposits of $371,108,000.00, and Commerce Union, the third largest bank, with deposits of $202,624,000.00.[16]

Considering the type of case relied upon by the appellant—one relying completely on concentration ratios—the adoption of the only "less anticompetitive" means available would result in the incongruity of a "less anticompetitive" merger resulting in *precisely* the same concentration ratios which are being so energetically condemned in this action. Merger of the Trust Company with Commerce Union would have resulted in the same market position by each of the Nashville banks that now exists—First American, Third National, and Commerce Union, in that order. Where Nashville had eight banks before the merger, it now has seven—just as it would have had if Commerce Union had merged with the Trust Company. The share of banking assets held by the three largest banks would have increased by exactly the same percentage if Commerce Union were the merger partner rather than Third National. And even more incongruous is the attack on Third National, which has never had a merger

[16] R. 104.

in its entire history, in favor of Commerce Union, the only bank in Nashville to merge in the last thirty years.[17]

The facts of the present situation are incontestable. There is, on the record before this Court and to the best of our knowledge, no "less anticompetitive" means of solving the problems of Trust Company.

The group of investors who had purchased the Trust Company from the Hill Grocery interests were all local individuals. Recognizing their inability to cure the deficiencies of Trust Company or to operate it themselves (Fdgs. 182, 183, R. 139, 140),[18] they were receptive to an offer which would best guarantee the best service to the Trust Company depositors and to trust beneficiaries to whom they felt an obligation. The testimony is conclusive that this group decided that Third National could best accomplish this purpose. As pointed out by this Court in *International Shoe,*[19] it is up to those on the scene to exercise honest judgment. There is a "familiar presumption of rightfulness which

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[17] In 1962, Commerce Union merged Broadway National, which had been a subsidiary. (INX-1, p. 105) In addition, Commerce Union is the only Nashville bank with branches outside Davidson County. (Fdg. 21, R. 113) Because of a 'grandfather clause" in the Tennessee branching statute, Commerce Union is currently located in seven counties. It is a remarkable commentary that the appellant would consider that the absorption of the Trust Company by the only bank having the competitive advantage of branches in the counties surrounding Nashville and in which industrial development is proceeding most rapidly, would be "less anticompetitive" than its merger with Third National. The latter as noted heretofore is active in the correspondent banking market which was described by the appellant's own expert as an almost perfect competitive market. (Tr. 3692)

[18] The business background of these investors did not necessarily qualify them to operate a bank. Hackworth's lack of banking (INX-22, R. 1333) and trust (INX-22, R. 1341) experience contributed to the decline of Trust Company on the lending side despite the growth in deposits due to his business and personal contacts.

[19] *International Shoe Co.* v. *F.T.C.*, 280 U.S. 291.

attaches to human conduct in general."[20] We submit that this presumption, buttressed as it is by uncontradicted testimony, should not be overcome by a totally unsubstantiated speculation.

Further, there is nothing in the record to indicate that the ten to one stock exchange proposed by Commerce Union to the group was a fair or bona fide offer. While appearing to give the investors a nominal profit, it does not consider the effect that the sale of such stock would have upon its value. The appearance of a large bloc of stock on the market would probably have depressed its value to a point at which the investors would have taken a serious loss. The unacceptability of such an "offer" was evident when the spokesman for the group did not bother to present it formally to his fellow investors. (R. 495)

The existence or nonexistence of an acceptable purchaser is a matter of fact to be determined by the district court if such an issue is raised by the party opposing the merger.[21] We submit that the facts in this case were such that no conclusion other than the one made by the district court would be reasonable.

It is further submited that this issue is not applicable to a bank merger antitrust case. The Bank Merger Act of 1966 clearly contemplates that a *substantially anticompetitive* merger may be approved if the convenience and needs of the community clearly outweigh the anticompetitive effects.[22] If the convenience and needs of the community clearly outweigh a substantially anticompetitive merger it does not matter that the merger itself could have been less anticompetitive. Approval in an instance where a less anticompetitive

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[20] Id., p. 302.
[21] *U.S.* v. *Diebold, Inc.*, 369 U.S. 654.
[22] 12 U.S.C. 1828(c)(5)(B).

means is not sought might arguably require that the burden of proof upon the defendants to show that the convenience and needs outweigh the anticompetitive effects would necessarily be heavier. However, as previously noted, the factual siutation in this case is so overwhelmingly clear that the appellant's contention is quite obviously without merit.

The Bank Merger Act of 1966 Established a Broader Standard by Which To Measure the Anticompetitive Effect of a Bank Merger.

In order to determine the legality of a bank merger, we must, as a first step, determine the effect of the Bank Merger Act of 1966 upon the application of traditional antitrust principles.

Although this Court reserved decision upon anything other than procedural issues in *Houston,*[23] it did specify that the provisions of the Bank Merger Act were available as an affirmative defense[24] to a traditional antitrust challenge. Combined with this ruling, however, was a specific refusal to rule on the omission of the phrase, "line of commerce," from the language of section (5)(B) of the Bank Merger Act despite the inclusion therein of each of the other standards of Section 7 of the Clayton Act. The pertinent portions of the two statutes are:

Section 7 of the Clayton Act:[25]

> That no corporation . . . the stock . . . or . . . assets of another corporation . . . where *in any line of commerce* in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly. [Emphasis supplied.]

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[23] *Supra*, p. 369, fn. 1.
[24] Id. p. 366.
[25] *Supra.*

Section (5)(B) of the Bank Merger Act of 1966:[26]

> The responsible agency shall not approve . . . (B) any other proposed merger transaction whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

Although the court below made a footnote determination that the omission of the phrase "line of commerce" was of no substantive significance,[27] we submit that the legislative history clearly commands a conclusion to the contrary.[28] Although the facts relating to the condition of Trust Company are such, and the benefits to the region have been so great, that the most stringent interpretation of the Bank Merger Act should result in the validating of the instant merger, the effect of this merger should also be evaluated in terms of financial institutions other than commercial banks.

This is then necessary import of the studied omission of the Clayton Act phrase "in any line of commerce"[29] from the operative language of subsection (c)(5)(B) of the new act. It is that phrase in Section 7 which, in non-bank merger cases, permits a merger to be tested by its effects in a submarket of some broader area of

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[26] 12 U.S.C. 1828(c)(5)(B).

[27] R. 98, fn. 5.

[28] At the close of final argument in the court below, counsel for the appellant mistakenly represented that the only reference to other financial institutions was in an extension of remarks in the Congressional Record; Senator Robertson, the Chairman of the Senate Committee on Banking and Currency, made specific reference to this issue on the floor. (112 Cong. Rec., 2549)

[29] 15 U.S.C. § 18.

effective competition, such as that existing among commercial banks rather than among all competing financial institutions.

> Because §7 of the Clayton Act prohibits any merger which may substantially lessen competition "in *any* line of commerce" emphasis supplied), it is necessary to examine the effects of a merger in each such economically significant submarket to determine if there is a reasonable probability that the merger will substantially lessen competition. *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 325 (1962).

As a result of this interpretation of "any line of commerce," the courts or the Antitrust Division could pick and choose a market in which some competition could be eliminated. Thus, an action could be brought to restrain a merger between steel producers, either on the basis of competition in the steel industry as a whole or in the sale of track spikes;[30] against the merger of a bottle manufacturer and a can manufacturer because both were container manufacturers;[31] or as in *Brown Shoe,* where the Court could not reach the conclusion that the shoe industry as such was a "line of commerce," it accomplished the same result by designating men's, women's and children's shoes as lines.

Prior to the passage of the new act, the majority of the House Committee and Currency Committee reported out the Ashley-Ottinger bill, S. 1698, as amended, in 10/19/65. The "balancing" clause in

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[30] *U.S.* v. *Bethlehem Steel Corp.,* 168 F. Supp. 576 (S.D. N.Y., 1958).

[31] *U.S.* v. *Continental Can Co.,* 378 U.S. 441 (1964).

Ashley-Ottinger is substantially the same as that contained in the Bank Merger Act:

Bank Merger Act of 1966	*Ashley-Ottinger Bill*
The responsible agency shall not approve . . . (B) Any other proposed merger transaction whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community.	A merger transaction which tends to lessen competition may be approved where the probable adverse competitive effect thereof is clearly outweighed in the public interest by the probable effect of such transaction in meeting the convenience and needs of the community to be served.

Neither bill made any reference to a "line of commerce," and the omission was a studied one. It was the clear intent of the committee majority that the regulatory agencies, the courts and the Justice Department assess competition as it really exists in the financial marketplace, rather than to permit a breakdown to competition among commerical banks or to a single aspect of their operations, such as checking accounts.

The committee report accompanying Ashley-Ottinger recognized that *all* facets of competition rather than

limited submarkets should be considered in the assessment of the legality of a merger:

> In making this review, your committe expects the banking agencies, the Department of Justice, and the courts to give full consideration to all aspects of the public interest, and take into consideration all lements of competition and all elements entering into the convenience and needs of those who are to be served by the resulting bank. The committee recognized that commercial banks face intensive competition fro mother financial institutions—savings and loan associations, mutual savings banks, insurance companies, finance companies, and so forth. *The committee also recognized that competition among commercial banks, and other institutions, includes local competition, regional competition, national competition, and even international competition for one part or anther of their business.* To overlook any of these aspects of competition, or *to concentrate on one of them to the exclusion of the others, would be unrealistic* and might well diminish, not increase, financial competition. [Emphasis supplied.]
>
> Committee Report, Ashley Ottinger
> Bill S-1698, as amended, 10/19/65

The House Report on H.R. 12173, which became the Bank Merger Act of 1966, comments as follows on the purpose of the bill:

> The banking agencies and the Department of Justice are united in the expression of their ultimate goals, which are the maintenance of a sound banking system and the promotion of healthy competition among *financial institutions* to the end that the needs of a growing economy and the individuals and business units which make it up shall be adequately served. Needless to say, the attainment of these objectives is also the primary con-

> cern of your committee in recommending for enactment the bill reported herewith. [Emphasis supplied.][32]

Accordingly, under the Bank Merger Act a merger must be tested by its effects, if any, on "competition among financial institutions."

Appellant urged below that the omission of the words "in any line of commerce" from the Bank Merger Act of 1966 was due to an oversight. However, the specific reference to "competition among financial institutions" in the House Reports, and the Senate debate on the bill confirm that the effect of competition in this case, as in every bank merger case, must be measured in the context of the actual competition that exists for the savings or investment dollar and for the placing of loans by any institutions performing either function. These institutions include, *inter alia,* credit unions, savings and loan associations, finance companies, and life insurance companies as well as banks.[33]

In Senate debate on the Bank Merger bill, Senator Robertson discussed sources of competition which must be considered by the agencies and the courts in assessing the competitive factor in a bank merger:

> MR. LONG of Missouri. In determining whether a proposed merger tends to lessen competition does

[32] H.R. Rep. 1221, 89th Cong. 2d Sess. (1966).

[33] The record below is replete, to an extraordinary extent, with the testimony and exhibits concerning the amount and intensity of such competition. (TR. 819, R. 302, R. 308, TR. 945-946, TR. 951, R. 385-386; TR. 1792-1794, TR. 1797, TR. 1806, TR. 1827, R. 595, R. 614, R. 623-630, R. 637, TR. 2248, R. 653-654, R. 655-656, R. 657, TR. 2360, R. 719, R. 729, TR. 2658, R. 769, R. 825; DX-23; INX-23; R. 1343; INX-25; INX-26.

the bill contemplate that only competition among commercial banks is to be considered?

MR. ROBERTSON: No; that would be entirely unrealistic. At the present time the banking agencies consider as relevant the competition offered to commercial banks by other financial institutions, for example, savings and loan associations, credit unions, insurance companies, mutual savings banks, and small loan companies. Such financial institutions compete with commercial banks and the effect of this competition must be considered by the agencies and by the courts when a proposed merger of commercial banks is being questioned. (112 Cong. Rec. 2550)

Senator Robertson, in elaborating on this remark, stated:

For personal demand or time deposits, banks compete with savings banks, savings and loan associations, and credit unions. This is real and fierce competition, as can easily be seen from the various trade publications and the newspaper advertisements which have followed the recent increase in the ceilings on interest rates in savings accounts in commercial and savings banks.

For consumer loans and home mortgages, commercial banks must compete with finance and insurance companies, in addition to savings banks, savings and loans, and credit unions.

Commercial banks must compete for deposits from and loans to business firms, with insurance companies, factors, savings banks and savings and loans, and even with the U.S. Government—both as issuer of bills and notes which corporate treasurers now find attractive in large quantities, and as issuers of vast quantities of FNMA, EXIM,

and SBA, Home Loan Bank and other obligations or participations.

And in most of the other services commercial banks provide, they meet with other competition. Trust services are also provided by individual lawyers, as every lawyer in the Senate knows, or by professional trustees, about whom our friends from Boston can tell us.

Furthermore, even in the field of commercial banking there are many varieties and kinds of competition. As the House report on the bill points out, the nationwide competition of automobile companies is quite different from the local competition of laundries. So also, competition between the 37 different billion-dollar banks in 14 different cities for the million-dollar deposits and loans of the great nationwide steel, aluminum, and chemical companies is very different from the competition of the local banks and savings and loan associations for an individual $20,000 home mortgage or the competition of local banks, credit unions, and automobile dealers for a $2,500 loan on a new automobile.

The small banks, the credit unions, and the small savings and loan associations are apt to compete only for the small local deposits and loans—the big banks compete with the big insurance companies and commercial factors and with each other for the nationwide business. They also compete with the small organizations for the local business. Each bank is surrounded by a series of concentric circles. The smallest one represents the area of competition for small deposits and small loans. A larger ring represents the area of competition for medium loans, and so on. The whole world is the area of competition for the biggest loans.

Any estimate of the competitive nature of the banking business in the broad and meaningful

> sense of the terms, and of the opposite—the degree of monopoly—must be based on the realities of the business of banks and of the other closely related institutions which make up the financial world. (112 Cong. Rec. 2541)

Finally, the purpose of omitting that crucial phrase is made apparent in the remarks of Senator Robertson:

> The text of paragraph (B) of the new bill follows the terms of Section 1 of the Sherman Act and Section 7 of the Clayton Act, *with the exception that the reference to "any line of commerce" in the Clayton Act is not carried over into the new bill.* In this respect the new bill resembles the Bank Merger Act of 1960, and calls for the appraisal of the *overall effects of the merger on competition, weighing increases of competition in one field against decreases in competition in another field.* The banking agencies and the courts, in other words, are not intended and are not permitted to select some single perhaps minor aspect of the banks' business and to say that, because there is some lessening of competition in this element of the business, the overall effects of the merger—the *increase of competition in the entire field of banking and in the broader field of financial institutions* which may result from other aspects of the merger—are irrelevant and may not be considered. (112 Cong. Rec. 2541) [Emphasis supplied.]

In summary, then, the basic purpose of the appellant's insistence upon defining a "line of commerce" as commercial banking is to permit its use of statistics as the primary measuring device by which the legality of a merger is to be assessed. The intent of the omission of "any line of commerce" requires the appel-

lant, at the very least, to prove the actual effects[34] of a bank merger as related to the totality of the financial market. This Court is not required, as the appellant has consistently maintained, to decide that because 8-1 equal 7 or 93+4 equals 97 that there has been a substantial lessening of competition. Nor is the mere fact of size controlling. As Judge MacMahon stated in *Manufacturers Hanover*[35] at p. 936; "the Government does not prove its case 'simply by reciting "Ten Little Indians" '." More to the point is Judge MacMahon's comments at p. 928:

> Arguments based on size, big or little, appeal not to reason or fairness but to emotion and prejudice. The government's cries may stir resonant chimes in some ears, but they strike a gong of alarm in ours. Daily experience in the trial court teaches that *such pleas generally mask a meritless case* and, if anything, compel an examination of the evidence with special scrutiny and cold objectivity. [Emphasis supplied.]

These words have particular significance in the case before this Court. The appellant, throughout the trial below, resorted continuously to the use of one statistic out of many, or to the use of one paragraph —or, indeed, one sentence—out of the context of an

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[34] As these banks are already merged, the appellant had twenty months prior to trial to study the actual competitive effects of this merger. Yet, even its own witnesses testified that competition was as keen, if not more so, as it was prior to the merger. No evidence of any sort was introduced to demonstrate a deprivation or deterioration of service, a decrease in competition, an increase in prices, injury to any person or institution stemming from the merger.

[35] *U.S.* v. *Manufacturers Hanover Trust Co.*, 240 F. Supp. 867 (S.D. N.Y. 1965).

entire letter. A representative example is the appellant's misleading labeling of an exhibit which contained a few isolated out-of-context facts and out-of-context excerpts from a few sentences in a FDIC examination report. This exhibit, GX-662 (R. 1125), *prepared entirely by the appellant,* was introduced as an "attachment" to a report of an examination of the Trust Company which had been prepared by the FDIC and which had been introduced by the appellee. Indeed, counsel for the appellant originally attempted to introduce this "exhibit" as part of the appellee Intervenor's document. (TR. 3627, 3759) It resisted the attempt to place before the Court the appraisals of the Trust Company, made years before this litigation or merger was ever contemplated by a totally disinterested and long-experienced examiner. (TR. 2730-2734, 2738-2775)

The addition of statistics relating to financial institutions to those relating only to banks serves to decrease the percentage of concentration of financial resources administered by banks. But, as every statistical or economic witness for the appellant conceded[36], competition is more than numbers. Competition can be more accurately described by people who are qualified observers of or participants therein. The proof of the appellees has established the existence of genuine competition throughout the local and regional area served

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[36] With the almost incredible exception of appellant's witness, Professor McNichols, who insisted that he could select a president of a bank from a paper (GX-645, R. 1107) containing nothing but statistics as to age and not physical condition, years of education but not scholarship quality, years of experience without regard to type of experience, and salary of unnamed individuals, none of whom the witness knew. (R. 904)

by Third National Bank. (Fdgs. 186-187, R. 140; Fdg. 84, R. 124; Fdg. 99, R. 127; Fdg. 105, R. 128) It is this type of proof, which permits the Court and the agencies to assess the entire competitive situation rather than one small submarket thereof, that the new statute favors by the elimination of the restrictive concept of "line of commerce."

The foregoing does not contradict the procedural rules of *Houston*.[37] Appellant may be able to prove a statistical case under Section 7 of the Clayton Act as interpreted by *Philadelphia*.[38] Thus, if a trend to concentration has occurred in a limited geographical market and a merger increases the degree of concentration of assets in commercial banking to the limits noted in that case[39], the appellant would make a prima facie case; *absent a defense*, the appellant would prevail. In any Section 7 case, bare statistics can create an inference or presumption of probable anticompetitive effect. A defendant is not precluded from challenging the inference. But because the competitive standard was changed by the omission of "line of commerce", and the intent of the Congress, the defendant may successfully attack the bare statistical case by a factual analysis of the marketplace and the burden it bears is less than in a case without a statutory provision similar to the 1966 Act. In a case where the merger has been consummated for almost two years, it is no longer a question of "probable" effect. The court is able to determine the *actual* effect of the merger.

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[37] *Supra.*

[38] *Supra.*

[39] None of these criteria were met by the appellant in the instant case.

Essentially, this is the meaning of the decision of the court below. Although based on *Columbia Steel*,[40] it appears that the decision stemmed from the intent of the supporters of the Bank Merger Act of 1966 to liberalize the test to be applied to bank mergers. The broadening of the market was accomplished through the elimination of the "line of commerce" phrase, and the competitive implications which are necessarily present in assessing "convenience and needs."

The conclusion that the omission of the phrase was deliberate is further strengthened by the fact that the *identical* language, with the same omission, was later incorporated into the Bank Holding Company Act of 1966[41] after a full debate and explanation in the same Congress.

The Merger Resulted in Increased Competition in Nashville and the Central South

The proof and findings of the court below do not support the conclusion that the Trust Company was a substantial competitor; but assuming *arguendo* that it was, its mere elimination would not result in a substantial lessening of competition by the standards defined by the new law. There can be a substantial difference, and in this case there is, between a "competitor" and competition. And, as this court stated in *Brown Shoe*[42]:

> The Antitrust laws are concerned "with the protection of *competition,* not *competitors.*" [S. Ct. emphasis.]

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[40] *Supra.*

[41] 12 U.S.C. 1842.

[42] *Brown Shoe Co.* v. *United States, supra,* at 320.

As already noted, the elimination of the phrase "line of commerce" together with the competitive features of "convenience and needs" has permitted an assessment of the overall effects of the merger; this assessment should not be limited to the "convenience and needs" side of the balancing test. A review of the entire record shows that the appellant's proof of competition was limited, with minor exceptions, to an emphasis on the statistical performance of Trust Company, the decrease in numbers of banks, and the statistical concept of concentration. The practical effect of establishing a restrictive "line of commerce", therefore, is that it prohibits a factual analysis of competition, as opposed to theoretical or numerical analysis.

The determination of an overall competitive effect requires that the agencies and courts weigh increases of competition in one field against decreases in competition in another. Senator Robertson's statement is directly on point:

> The banking agencies and the courts . . . are not intended and are not permitted to select some single, perhaps minor aspect of the bank's business and to say that, because there is some lessening of competition in this element of the business, the overall effect of the merger—the increase of competition in the entire field of banking and in the broader field of financial institutions which may result from other aspects of the merger—are irrelevant and may not be considered.
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> * * *
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> In considering whether a proposed merger may lessen competition . . . the banking agencies and the courts will, of course, take into consideration all the factors which I have discussed under the question of monopoly—the competition from other financial institutions in one or another part of its

> business, the competition from other banks and other financial institutions, locally, regionally, nationally and internationally, the inevitable limitations on competition imposed by statute and by regulatory authorities, with respect to entry into the business and with respect to the carrying on of the business. All of these factors must be taken into consideration in weighing the overall anti-competitive effects of the merger.[44]

The new law, therefore, contemplated that *a removal of an entity from the financial marketplace could result in an increase in competition.* The record in this case is clear that competition in Nashville is keen and that it has increased substantially since the merger. (Fdgs. 186, 187, R. 140).

The appellant's own witness, Patterson, a theoretical economist then studying for his Ph. D.[45], acknowledged that the increase in Nashville competition may well have stemmed from the fact of the merger; his conclusion that competition might decrease after a new competitive pattern was established was based upon his assumption that competition had settled into a routine prior to the merger.[46] This was the sole doubt cast upon the future endurance or past vigor of competition in the Nashville financial market.

Patterson's assumption was challenged by the State Superintendent of Banking:

> The proposed merger could in my opinion increase competition. (INX-8, R. 1261)

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[44] 112 Cong. Rec. 2541-42.

[45] TR. 3684.

[46] R. 918.

and by the Comptroller of the Currency:

> It [the merger] has been beneficial by providing additional stimulus to this economy and, indeed, to other institutions here without eliminating any substantial measure of competition. (R. 819)

Moreover, bank officials and individuals with a first-hand knowledge of the Nashville financial community confirmed the prior existence of keen competition and its increase since the merger. (R. 285; R. 309; R. 384; R. 609, 610; R. 626, TR. 2284; R. 762, 773; R. 776; R. 264-265.) The competitive atmosphere in this area is so intense that only one new bank has entered this market since 1927.

Two years elapsed between the merger and the conclusion of the trial. Despite the merger, bank service charges by Nashville banks had not increased above pre-merger rates (R. 356-357) and are among the lowest in southern cities of comparable size.[47] This is strong evidence of vigorous competition.[48]

In view of the history of financial competition in this area and its intensification since the merger, there is no reasonable basis for accepting a theory which is admittedly not universally accepted among economists (R. 924), and which lacks a single fact for support.

Moreover, to have a substantial effect on competition, one must be a substantial competitor or at least the potential to be one. What is "substantial"? If measured against the resources of all financial institutions in Nashville, the Trust Company has approximately 2 per cent. (DX-30-A.) In terms of personnel,

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[47] TR. 922.

[48] Fdgs. 263-265, R. 151-152.

it was inadequate. (Fdgs. 126-132, R. 129-130) At the time of the merger, it did not have one full-time business solicitor. (R. 279; Fdg. 126, R. 131) In terms of branches, it had but one small one (Fdg. 176, R. 139) in a community with 44. (Fdg. 84, R. 123) By the admission of its own ex-officers, one now employed by the largest bank in Nashville, its efforts were directed almost solely to solicitation of suppliers to the Hill Co. stores (R. 703; R. 270-272) and these suppliers were impliedly threatened with boycotts of their products if they failed to deposit with the Trust Company. (R. 272) No bank regulatory official considered it a substantial or major competitor. (R. 819; GX-613, R. 1087-1088; INX-8, R. 1261) The few who called it a substantial competitor could have been influenced, in one case, by the loss of a $2,500,000 correspondent balance as the result of the merger (Fdg. 236, R. 147-148); or, in another, not only by the loss of a "nice" deposit (Fdg. 243, R. 148) but also by the failure of his institution in its attempt to obtain the Trust Company. (R. 249-253, 289, 290; R. 495) The rest were admittedly unacquainted with the Nashville banking scene and were merely judging the situation from statistical papers.

The Trust Company was in existence as a bank for 26 years before Third National was founded. (Fdg. 5, R. 110; Fdg. 10, R. 111) If, after an existence of 63 years, it was in a state of decline and had never become a serious competitor in the Nashville financial or banking market, there would appear to be little question regarding its lack of potential.

But assuming substantiality for purposes of discussion, it is apparent that there must be degrees of substantiality; and the less the substantiality, the less is

to be required in a showing of convenience and needs. The appellant is really suggesting that there must be an overwhelming preponderance of evidence relating to the serving of the convenience and needs of the community to be served. In so doing, it has approached the position that only the prevention of a community disaster which would result from the failure of a bank would suffice to overcome a lessening of competition. Such a position, of course, is not an atypical stance by the appellant in this case. If, however, Congress meant only that the failing bank was to be protected, the entire legislative product borders on the absurd—for subsection (6) of the 1966 statute provides for the failing and troublesome banks.[49]

This (failing company) argument is merely a variation of the "no substantive change" theme. The *Philadelphia* case recognized not only the "failing company doctrine" but its broader application to banking:

> Thus, arguably, the so-called failing company defenses . . . might have somewhat larger contours as applied to bank mergers because of the greater public impact of a bank failure compared with ordinary business failures.[50]

If this Court has already subscribed to this notion, what purpose would be served by solemnly enacting a totally unopposed principle? We cannot assume that Congress legislated for no purpose.

The legislative history conclusively demonstrates that it was *not* the failing bank that Congress had in mind in passing the new statute, but that the merger of a declining institution with a sound one *or the*

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[49] 12 U.S.C. § 1828(c)(6).

[50] *Supra*, at pp. 371-2.

merger of two sound banks would be legal if the benefits to the public outweighed the anticompetitive effect.

Consider the analysis of Representative Widnall:

> Let us take, for example, the instance of a town having three banks, two of which are strong, aggressive, well-managed, and properly servicing the community. The other one is *poorly run*, has *little prospect for adequate management succession*, is *not making the loans it should*, and, in short, is a *declining* institution. In this situation, the third bank is a detriment to the community. Now, if it merged with one of the other two banks there would quite obviously be a reduction in competition if one plays the game strictly by number. A strict interpretation of the antitrust laws might simply perpetuate a substandard financial condition. On the other hand, the community would stand to gain significantly since the remaining banks could better serve its financial needs.[51]

and of Representative Weltner, an opponent of the bill, in the following colloquy with Representative Multer, a suporter:

> (Mr. Multer had just hypothesized a merger in a two bank town as serving the public interest because one of the banks was hoarding government securities instead of building up the economy by lending.)
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> Mr. Weltner: This is a case of a failing bank, which has long been recognized by the court. It has nothing to do with this legislation . . . we do not have to pass any bill to permit the approving agency to merge a bank in order to save it from insolvency.
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> * * *
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> Mr. Multer: I have gone beyond the failing bank theory. There are many instances where we are.

[51] 112 Cong. Rec. 2335.

> not concerned with the failing bank, where there is an absolute and complete diminution of competition, yet under all the circumstances * * * the courts should approve the merger just as the regulatory agencies may . . .[52]

In view of the foregoing, the contention that a bank must be failing or in a condition suggesting foreseeable failure, to justify its merger with another bank located in the same community is without merit.

The foregoing also confirms the obvious: that subsection (5) of the Bank Merger Act was directed to a merger which lessened competition substantially—and it clearly states that such a merger may well be lawful.

The plain meaning of the words "clearly outweigh," without reference to legislative history, means simply a preponderance of the evidence. If Congress intended to require the showing of an overwhelming or an almost unattainable preponderance of evidence relating to convenience and needs, it would have so specified. Most of the Congressional dialogue on the bill supports the concept that only a simple preponderance is necessary. Even the foremost antagonist of the bill, Chairman Patman, stated:

> . . . —when we say clearly outweighed we mean *outweighed by the preponderance of the evidence.*[53]
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> [Emphasis supplied.]

This interpretation is in complete accord with statements made by Representative Smith (Va.), Brock, Ashley, Moorehead, Stephens and Stanton in the course of debate on the bill.

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[52] 112 Cong. Rec. 2346.

[53] 112 Cong. Rec. 2334.

It follows that the degree of substantiality of anti-competitive effect is directly related to the required showing of convenience and needs. If the alleged anti-competitive effect is remote or speculative, or if the substantiality of competition is of such a limited degree as to cast some doubt upon the validity of its characterization as substantial, the proof required of beneficial effect on the convenience and needs of the community would automatically be less than if the substantiality of competition offered by the absorbed institution was unquestioned.

Any merger between two of the three large banks in Nashville, for example, would require a far greater showing of benefit to the community to counterbalance the removal of competition that is the case here.

In determining the benefit of the merger to the convenience and needs of the community to be served, the Court may likewise consider the benefits of increased competition by the remaining competitive units, for the appellant does not deny that an increase in competition meets the convenience and needs test. In this case, for example, competition has resulted not only in an increase in the utilization of assets and personnel of the Trust Company; it has resulted in their deployment in some areas for the first time. (R. 638)

What is the meaning of "community to be served"?

This phrase, speaking as it does to the community *to be served* is necessarily prospective. The language is clear, and it appears from the opinion and findings below that the court did consider that the community to be served was, in fact, the area served by the TNB correspondent system rather than the "area of competitive overlap" comprised solely of the local market consisting of Davidson County.

We submit that Congress had such a larger concept in mind. The House Report on H.R. 12173,[54] in discussing this phraseology, states, in pertinent part:

> . . . where it is clearly shown that a given merger is so beneficial to the convenience and needs of the community to be served—recognizing that *effects outside the section of the country involved* may be relevant to the capacity of the institution to meet the convenience and needs of the community *to be* served. . . . [Emphasis supplied.]

The record in this case demonstrates conclusively—indeed, it is uncontradicted—that Third National is serving the entire Central South, an area bounded by the Smokies, Birmingham, Louisville, and the Mississippi, through its large correspondent system. (Fdg. 108, R. 128) Sidney Cohn of Acme Boot Company, whose factories are located up to 80 miles from Nashville (R. 583), testified that his business was able to grow and prosper only through the assistance of Third National (R. 584-586), and that his relationship to Third National has been responsible for the employment of Tennesseeans in the areas of Acme's plants. (R. 583)

The president of the First National Bank of Clarksville testified that his bank's correspondent relationship with Third National was responsible for construction, employment, and civic improvements in his county. (R. 767-768; Fdg. 107, R. 128)

The plaintiff's own witnesses testified to the substantial degree of competition among banks from all over Tennessee in the correspondent market (TR. 3691-3692; TR. 1215-1216), while a Birmingham banker

[54] H.R. Report No. 1221, 89th Cong., 2d Sess. (1966).

confirmed that competition with Third National in the Northern Alabama area. (TR 2018, 2026)

The record is clear that small banks in small towns *must* have a correspondent relationship with a large bank in order to survive. (TR. 3750; R. 767-768; TR. 2599; TR. 2657-8) Third National is assisting more than 360 banks throughout the Central South in rendering a greater economic service to their areas. (Fdg. 108, R. 128)

While it is true that a small county bank is located in and affects the economy of a smaller community, which could be as small as a single town or which could conceivably overlap into two or more counties, it is uncontested that Third National is a regional bank. The community it served before the merger is the community it services today—the Central South.

The comments of Representative Reuss support this concept: [55]

> Another factor to be considered would be the real market in which competition in banking occurs. A single town might not constitute the competitive banking market for significant consideration. In such circumstances the community or section of the country constituting the actual market would have to be considered in making the judgment as to whether or not the convenience and needs of the community were being served.

There appears to be no disagreement among either the proponents or opponents of the 1966 Act that the community to be served may be substantially larger than the town in which the merging bank is located. The House committee recognized this distinction also

[55] 112 Cong. Rec. 2338.

by noting the difference between national, regional and local markets. It noted, for example, that automobile manufacturers were dealing in a national market while a laundry is localized.[56]

In view of the foregoing, we do not believe that a circumscription of Third National's community to Davidson County would be any more justified than a limitation of General Motors' distribution area to the City of Detroit. As there is no contradiction of evidence that the area served by Third National was the entire Central South, as hereinbefore defined, we suggest to the Court that this is the appropriate area to be considered when considering the convenience and needs of the community to be served.

The Trust Company was not active in the correspondent business; its few accounts were complimentary in nature. (Fdg. 100, R. 127) Despite its existence as a bank for 26 years before Third National was founded, it failed to become a competitor throughout the Central South. This failure was not because of a lack of opportunity, but because of the Trust Company's default. (R. 637) It would be manifestly unfair to penalize an institution which has entered the competition to service the great and growing natural competitive arena of Nashville banks by measuring the effects of this merger only in an area circumscribed by the competitive default of the Trust Company.

The District Court Properly Assessed the Competitive Effect of This Merger

The appellant contends that, since the competitive standard applied by the District Court was incorrect, its conclusion as to convenience and needs is in error.

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[56] H.R. 12173, 89th Cong., 2d Sess., p. 3.

Particularly at issue is the lower court's reference to rule of reason principles articulated in *Columbia Steel*[57] as the basis of its analysis of the competitive effect of the merger, and its refusal to adopt the appellant's carefully discriminate statistical case. The record, however, conclusively demonstrates that the lower court could not reasonably have relied upon the statistics submitted by the appellant. So-called "growth" statistics for Trust Company were made for a nine year period starting with the year before Hackworth was appointed president—an obvious attempt to distort the growth picture by reflecting the tremendous upsurge in deposits from Hackworth's connections against a very poor base. (TR. 556-557; GX-1000-1010, R. 1157-1165)

The appellant's entire statistical case was so contrived that the appellant's counsel, on redirect examination of his expert, made him admit that his statistics could be made to "jump through hoops." (TR. 560)

An "expert economist" for the appellant had never majored in the subject and had a total of two semester's experience teaching: *a* semester course in basic economics in an evening school (Southeastern University) in Washington, D.C., and *a* semester course at a junior college (Strayer). (TR. 190-192)

The appellant attempted to introduce a chart (GX-1011) purporting to show the projected earnings of Trust Company for 1964 at $344,000. The witness who prepared the chart conceded that he knew nothing about the bank's accounting procedures or whether it was on a cash or accrual basis. (Fdg. 244, R. 146) He did not consider the bonuses paid at Christmas; he failed to consider whether allowances had been made

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[57] *U. S.* v. *Columbia Steel Co., supra.*

for pensions (R. 222-223; Fdg. 224, R. 146); he had failed to allow some $200,000 for bad debt reserves. (R. 222; Fdg. 224, R. 146)

An "expert" for the appellant was presented a table which listed the title, age, years of education, years of banking experience, and salaries of the officer staff of Trust Company. (TR. 3488-3489; GX-645, R. 1107) This document did not identify the officers; it did not attempt to define or evaluate "experience"—a teller with 30 years experience in a $1 million bank would show up as well in "experience" as a 30 year president of Bank of America; it did not define or evaluate "years of education"—the names of schools, courses, class standings, degrees and honors were all absent. Yet on the basis of this bare numerical table, this "expert" was able to pick a person most competent to become a bank president. (R. 876)

Its major economic witness, with no first-hand familiarity with Nashville banking markets, and who had made no major study of banking testified that a bank making unsound loans was contributing to the economic good of the community. (R. 333-334) He was unable to cite one fact in support of any theory he advanced.

The appellant's only banking witness came from the two other large banks, one of which lost a $2,500,000 correspondent account from Trust Company (R. 353; R. 700; R. 641; TR. 2135), and the other which had itself wanted to merge the smaller institution. (R. 249-253, 289, 290; R. 495) Nashville bank presidents called by the appellant conceded that competition had remained keen or had increased subsequent to the merger. (R. 285; R. 309) Two small banker witnesses testi-

fied that their banks had not been hurt by the merger, but had experienced their greatest growth since the merger. (Fdg. 88(b), R. 125; R. 306; R. 753)

Should it be a cause of wonder, then, that the court below refused to accept such a contrived statistical case when the overwhelming preponderance of the evidence introduced by the appellant's witnesses, as well as the appellee's, was that the Trust Company grew only because of friendship of the president. (Fdg. 115, R. 129), coercion of suppliers (R. 272), an unusual infusion of government deposits (R. 247), and the practice of "window dressing" (Fdgs. 214-215; R. 144); that it had no will to compete (Fdgs. 101-104, R. 127; Fdg. 176, R. 139; Fdgs. 248, 249, R. 149; Fdg. 255, R. 150); if it had found the will, it lacked the ability (Fdgs. 101-104, R. 127; Fdgs. 175, 176, R. 130; Fdgs. 248, 249, R. 149; Fdg. 255, R. 150); and it did not have the resources to obtain the talent it needed because of below average salaries, lack of benefits (Fdg. 139, R. 133) and the unavailability of such talent generally. (Fdg. 130, R. 132)

The appellant may, arguably, have established a *prima facie* Section 7 Clayton Act case in its case-in-chief, but such a conclusion does not appear to be warranted[58] by the facts of the case. In the instant case, the increase in market shares held by the largest three banks is about 4.8 per cent. (GX-1013, R. 1168) The combination of the two banks did not disturb the relative standing of any Nashville bank; with a single

[58] The appellant has not contested the dismissal of the Sherman Act § 1 count by the District Court. In view of the overwhelming evidence that the Trust Company was not a major, significant or substantial competitor in Nashville, this is not a surprising development.

exception of Commerce Union's merging with a subsidiary, there was no merger in Nashville since the depths of the depression; there remain, after the merger, as many independent banks as in 1934, as a new bank, Capital City, now the fourth largest, was chartered in 1960. (R. 11; R. 62) Moreover, *Philadelphia* did not eliminate defenses to an otherwise proved Clayton Act charge in banking, although it probably limited such defenses to those relating to liquidity and soundness[59] within the "broader contours" of the failing company doctrine. The Trust Company's declining condition constituted a warning to bank regulatory officials that a more serious situation would develop if the deficiencies were not corrected. It is reasonable to believe, in view of the defense presented in the court below, that the situation in Nashville was serious enough to justify this merger under Section 7 standards.

That the Bank Merger Act of 1966 permits a broader standard to be applied to bank mergers than to unregulated industries is clear from the legislative history of the Act, *if we rely upon the successful proponents of the Act* rather than the opponents for its meaning. A brief history of the Bank Merger Act is essential to its understanding.

Legislative History of the Bank Merger Act of 1966

The amendment of the Bank Merger Act of 1960 was set in motion as a result of Congressional reaction to the *Philadelphia*,[60] *Lexington*,[61] and *Manufacturers*

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[59] *Supra*, p. 372, fn. 46.

[60] *Supra*.

[61] *U.S.* v. *First National Bank and Trust Company of Lexington*, 376 U.S. 665.

Hanover[62] decisions. The rule adopted by this Court in *Philadelphia* was adopted by Judge MacMahonin in *Manufacturers Hanover* at page 884:

> Thus, the Bank Merger Act would appear to sanction agency approval of a merger, even though it violated the antitrust laws, if, on a balance of all the designated factors, the agency decided that, nevertheless it was in the overall public interest. *A court, however would be obliged to invalidate a merger found to violate the antitrust laws even though it served the public interest.*
>
> [Emphasis supplied.]

This opinion apparently confirmed the fact that the Bank Merger Act of 1960 and the responsible agency's approval had no efficacy once an antitrust suit was filed by the Department of Justice.

Progress of Legislation

In all bank merger litigation since the passage of the 1966 Act, and in its brief before this Court in *Houston*[63] the appellant has urged that the courts base their interpretation of the new statute upon the record made in the House of Representatives by the Chairman of the House Banking and Currency Subcommittee, Representative Patman, and another member whose support of the chairman throughout the entire committee process was unwavering, Representative Reuss. The appellant describes these gentlemen as either principal architects or the authors of the legislation and has urged the Court to accept as reliable and accurate the interpretations of the Act by these two and the

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[62] *Supra.*

[63] *Supra.*

few other members of Congress who opposed the bill to the end.

This Court, in *Houston,*[64] identified Representative Patman as the "sponsor" of the Bank Merger Act of 1966. The Court is respectfully urged to reconsider this assessment of the Chairman's stance on this legislation. As the following makes clear, the bill was enacted into law despite the Chairman, who had lost control of his committee.[65]

The appellee urges that the explanations of Senator Robertson and Representative Ashley properly define the scope and intent of the Act. The legislative history demonstrates beyond a reasonable doubt that the legislation now being considered by this Court was the handiwork of these two men.

Within a month after the *Manufacturers Hanover* decision, Senator Robertson, Chairman of the Senate Banking and Currency Committee, introduced S. 1698, a bill to exempt all mergers approved under the Bank Merger Act of 1960, past, pending, or *future,* and all mergers duly approved before 1960 from all of the provisions of the Clayton and Sherman Acts.

S. 1698 was amended by the "Proxmire" amendment and passed by the Senate on June 11, 1965. The amendment exempted all past bank mergers from antitrust attack. However, because the amendment required the banking agencies to apply the standards of the Bank Merger Act of 1960 to future mergers, while, at the same time permitting the Justice Department,

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[64] *Supra,* p. 366.

[65] *United States* v. *Crocker-Anglo National Bank,* 67 Trade Cases, ¶ 72,258.

within 30 days, to attack the merger under the Sherman and Clayton Acts, the anomalous situation of having the regulatory agencies and the courts applying different standards to a bank merger would have been reinstated. The only basic change in the law would have been to provide a 30-day statute of limitations on the filing of a Clayton or Sherman Act attack on a merger.[66]

After passage by the Senate, S. 1698 was referred to the House Banking and Currency Committee. Chairman Patman soon made clear that he would not favor any change in existing law. The history of the bill from this time on recounts one of the most bitter battles ever waged in a Congressional Committee. It resulted from an attempt by the Chairman to prevent, by exercise of his prerogatives, remedial legislation strongly advocated by an overwhelming majority of his own committee.

Representative Patman referred the Senate bill to the Subcommittee on Domestic Finance where no action was taken until July 19, 1965, when a letter from 26 of the 33 full committee members demanded that the chairman schedule hearings on it. Occasional hearings were held into early fall until, on September 13, Congressman Ashley introduced H.R. 11011. This bill formed the framework for later amendments and ultimately the enacted legislation.

On September 29, 1965, a majority of the committee (not including Representative Reuss) addressed a letter to the Chairman engaged in further dilatory

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[66] It should be noted that the Proxmire amendment, which would have codified the *Philadelphia* and *Lexington* decisions, was rejected, not only by the Ashley group, but by Chairman Patman himself.

tactics and also failed to advise his committee of a letter which he had received from the Attorney General which largely reversed the Justice Department's previously stated objections to remedial bank merger legislation. The letter leaked and became public. Shortly thereafter, Congressman Ashley detailed the chronology of the Chairman's efforts to prevent the passage of bank merger legislation. The letter contains such a forceful description of the opposition of the Chairman to bank merger legislation that it would undoubtedly be helpful to quote it in full; it is attached to this brief as an appendix.[67]

Congressmen Ashley and Widnall, the latter being the senior minority member of the committee, obtained a petition requiring the Chairman to call a voting session of the committee. A series of these meetings ended impotently over point of order wrangling. Congressman Ashley in the meantime had reworked H.R. 11011 to include suggestions of interested parties. Because of the intrasigence of the Chairman, no committee vote had been taken until October 19. Backed by a majority of the commitee, Representative Ashley arranged for a committee session on that date to which the Chairman was not invited. When the committee staff notified Mr. Patman, he ordered the meeting disbanded but the insurgent group remained. *It was at this point that Representative Reuss entered the legislative picture* and not before. He entered the committe room and attempted to rule the meeting out of order as not being in accordance with the Chairman's instructions. The committee overruled the motion and voted out the Ashley bill 17 to 1. The substantive paragraph of the Ashley bill is almost identical to the bill finally enacted

[67] Appendix A.

into law. Indeed, the report on the final bill (H.R. 12173) simply incorporates its "purposes" section from the report on the Ashley bill.

This background should clarify the actual sponsorship of the Bank Merger Act of 1966.

After passage by the committee of the Ashley bill it became apparent that some legislation would emanate from the Congress. During the winter recess, Representative Reuss worked closely with the Justice Department to modify the language of the Ashley bill. The principal changes proposed by the Department of Justice and by Congressman Reuss were *not* enacted.[68] The measure which finally passed was, in large part, identical with the Ashley bill; it was consistent with the purposes of the Ashley bill in its entirey.

By the time the committee met again on January 18th, Chairman Patman offered to help to send a merger bill to the floor of the House if his colleagues would repudiate the Ashley bill which he claimed had been passed by a "rump" session of the committee. However, by a vote of 18 to 14 the committee insisted upon the legitimacy of its October action with the Chairman and Representative Reuss in the minority.

The situation at this point had become intolerable to the House leadership. It was reliably reported in an

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[68] This was noted in the statement of Senator Bennett, placed in the Congressional Record of September 15, 1966, p. 21838:

> The Attorney General suggested amendments during the consideration of the legislation which would have made his power stronger, as they [attorneys for the Department of Justice] are claiming it is. It is significant that the Congress turned down the Attorney General's recommendations in passing the amendment.

article in the Wall Street Journal of February 8, 1966 which appears in the Congressional Record [69] that the speaker, in a compromise action, held that the October bill would be "junked" in order to uphold the committee system of the House. However, the committee *majority,* led by Congressman Ashley, was allowed to write the bill which Mr. Patman would introduce the next day.

We believe that this commentary will assist the Court in evaluating the weight to be given to Mr. Patman's statements as floor leader of the bill. Remedial bank merger legislation was vigorously opposed from its inception by Mr. Patman who would not participate in the drafting of the bill. His support of the bill came only when he was faced with the humiliating alternative of an unprecedented defeat by a majority of his committee who recognized the need for new legislation. Insofar as Congressman Reuss is concerned, we suggest that his comments on a bill which he opposed must be viewed in proper context. Therefore, in assessing congressional intent the Court should give special credence to those Congressmen who not only voted for the bill, but who actively participated in its drafting: Representatives Ashley, Widnall and Ottinger; and in the Senate, Senator Robertson.[70]

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[69] 112 Cong. Rec. 2546.

[70] In its October 20, 1967, opinion in the case of *U.S. v. Crocker-Anglo National Bank, supra,* a three judge court consisting of Circuit Judge Pope and District Judges Zirpoli and Sweigert unanimously agreed that Senator Robertson and the Ashley-led majority of Mr. Patman's committee were the "winners" in this legislative battle. As asked by the Court, at p. 38 of the slip opinion, ". . . is it not to the winners that we should turn for an evaluation of the meaning of the statute?"

On Tuesday, February 8, 1966, the House passed the bill by a vote of 372-17. On the following day the bill, as amended by the House, was debated in the Senate after its introduction by Senator Robertson. It passed on voice vote and was signed into law on February 21, 1966.[71]

It is significant that Congressman Patman, in reporting to the House on the bill which bore his name, stated:

> Mr. Chairman, if I alone were writing this legislation and proposing it *I would be against it as a matter of principle.*[72] [Emphasis supplied.]

It would be only natural for the Chairman, who opposed the bill with such vigor and who admitted that he was opposed to it "in principle", would attempt to dilute its effectiveness in any remarks he would make on the floor, allegedly in favor of its passage.

We urge that the Court note that the final bill was wholly satisfactory to its sponsors and extremely distasteful to the Chairman of the Committee, whose name it bore. We ask also that the Court observe the fact that the bill is unsatisfactory to the Department of Justice with whom the Chairman's associates worked closely. It seems obvious that it is to the com-

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[71] In submitting H.R. 12173 to the Senate, Senator Robertson acknowledged the large role played by Representative Ashley in securing passage:

> I want to pay a special tribute to Congressman Ashley of Ohio for his work in connection with this bill. His untiring and constructive efforts have brought about virtual unanimity in the House.

[72] 112 Cong. Rec. 2357.

mittee majority and *not* to the Chairman that we should turn for an evaluation of the meaning of the statute.

The Legislative History of the Act Supports the Conclusion That a Lesser Competitive Test Exists Than Under Section 7 of the Clayton Act

That the "affirmative defense"[73] provided by the Bank Merger Act includes a more factual and realistic assessment of competition as well as a provision for weighing "convenience and needs" is best noted by reciting the comments of the bill's supporters during Congressional debate:

Senator Robertson:

> We do not want the court to say as it did in the Philadelphia case, that a merger which may substantially lessen competition in one line of business in one section of the country "is not saved because, on some ultimate reckoning of social debits and credits it may be deemed beneficial". *We do not want the court to apply a statute* which, in the words of one court in the Philadelphia case, proscribes "anticompetitive mergers, the benign and the malignant alike".[74] [Emphasis supplied.]

Representative Brock

> Congress, in passing the Bank Merger Act of 1960, attempted to make its views clear that bank mergers should be weighed in terms of both banking factors and competitive factors . . . . However, the Supreme Court . . . limited its consideration to one factor alone . . . competition.

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[73] *United States* v. *First City National Bank of Houston, supra.*

[74] 112 Cong. Rec. 2540, 2541.

> For those [mergers] consummated subsequent to the Philadelphia case, we simply provide that they shall be adjudged using the clarified standards of this bill.[75]

Representative Ashley

> The bill would require the court to use the new standards of the bill in all . . . "post-Philadelphia" cases . . . .
>
> The courts have repeatedly held that under the antitrust laws, the social or economic benefits of a given merger cannot even be considered. In the Philadelphia case, the Supreme Court said: [quoting the "ultimate reckoning" language]
>
> It is a primary purpose of the bill to assure that the courts will never again dismiss as irrelevant the question of the needs of a community . . . [T]he merger must be shown to be sufficiently beneficial in meeting the convenience and needs of the community to be served that, *on balance,* it may properly be regarded as in the public interest[76] [Emphasis supplied.]

In introducing the legislative question Representative Smith (Va.) said:[77]

> It boils down largely to a question of the Department of Justice, under the act, being required to use these standards where the main consideration is the convenience and the necessity of the community. The only authority that would be left to fix standards by the Department of Justice would be the monopoly provision of the Sherman Antitrust Act. [Sec. 2]

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[75] 112 Cong. Rec. 2337.

[76] *Id.*, p. 2339.

[77] *Id.* p. 2332.

Representative Widnall (N.J.)

H. R. 12173 states the conditions under which banking agencies may approve a merger that is opposed by the Department of Justice. Furthermore the bill gives the courts clear guidelines for weighing banking factors against competitive factors.

There are very good reasons for giving the banking agencies more of a say in merger cases than is accorded some other businesses . . . strict application of the antitrust laws [in banking] can . . . sometimes . . . have a deterimental effect on a community.[78]

Representative Moorhead

In H.R. 12173 we are merely saying that first the banking authorities, and then the Attorney General, and finally the courts may approve a bank merger "*despite* the foreseeable injury to competition" if "the merger would be consistent with the public interest" [quoting from *Seaboard Air Line R. Co.* v. *United States,* 34 L. W. 3181][79]

Representative Celler

While I am not particularly married to the idea and I do not like a weakening of the antitrust laws . . . I shall . . . vote for the bill . . . .[80]

Representative Stanton

it was the expressed purpose and intent of Congress when it passed the Bank Merger Act in 1960 to make certain that control of bank mergers should be in the hands of the appropriate bank-

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[78] *Id.*, p. 2333.

[79] *Id.*, p. 2341.

[80] *Ibid.*

ing supervisory agencies, and that while the competitive effects of a proposed merger should be considered, they were not to be given a predominant positon.

These standards were repudiated by the Supreme Court in the Philadelphia National Bank and the Lexington Bank cases in which the Court decided that the Justice Department had the final say in bank mergers. Contrary to the intent of Congress, the bank regulatory authorities were relegated to advising roles.

* * * * * * * * * *

These provisions . . . reinstate a measure of antitrust consideration which was lacking in the Senate bill, and they provide a banking standard that may allow economic asistance to a community even though a merger tends to lessen competition in that community. It is this statutory balance that was intended in 1960. . . .

* * * * * * * * * *

The . . . bill . . . directs the courts to apply the banking standards as well as the competitive standards in any judicial proceeding attacking an approved merger transaction . . . it . . . gives these standards equal weight as between economic and competitive circumstances and it assures this equilibrium throughout the entire review procedure.[81]

The same theme was emphasized in the Senate the following day.

Senator Proxmire

Subsection 5(b) was designed to change the law as it now stands, to allow the convenience and needs of the community to outweigh any anticompetitive effects that the merger might have.

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[81] *Id.*, p. 2343.

> Thus, it is a new standard. It is a clearly different standard that would apply in the case of banks.[82]

Senator McIntyre

> This bill will reassert the power of the Congress to set down the rules for bank mergers, and will correct what I consider to be errors which the courts have made.[83]

Senator Hart [Chairman of the Subcommittee on Antitrust of the Judiciary Committee]

> the effect of the amendment added to the bill by the House is to amend the antitrust laws by providing special treatment for the banking industry. Under the House bill the banking industry will be less subject to the antitrust laws than any other segment of our economy.[84]

More than any of its sponsors' words, Section 3 of the 1966 Act evidences a more liberal interpetation of the antitrust laws in the case of a bank merger. As the *Philadelphia* case was one of those responsible for the enactment of the new statute, we must assume—and the record positively indicates—that the responsible committees and the Congress were aware of the ruling in that case.

In *Philadelphia,* according to this Court's opinion (and apparently undisputed facts) two good, sound banks with no management, capital, asset or liquidity problems attempted to merge. Their main defense,

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[82] *Id.*, p. 2548.

[83] *Id.*, p. 2549.

[84] *Id.*, p. 2546.

other than the inapplicability of Section 7 of the Clayton Act, was the need of the Philadelphia banking community for a larger bank to meet competition from New York and to attract new industry to the community. Yet Congress enacted Section 3, inviting banks which had applied for merger prior to the enactment of the new law, and whose merger was blocked because of Justice Department action, to reapply in the light of the *new* standards of the 1966 Act. The *only* such bank merger stopped by a litigated case was that of Philadelphia National and Girard Trust.

Congress, having the *Philadelphia* decision before it, invited these two banks to reapply. This, too, would be a futile gesture unless Congress intended to uphold the lower court's judgment that the regional or national community which would be served by the creation of a larger Philadelphia bank was more in need of such service than the "area of competitive overlap" between the two merging institutions was in need of competition; for no other factor had changed.

As noted by Senator Sparkman:[85]

> The Justice Department overlooks Section 3 of the 1966 law, which specifically authorizes the two Philadelphia banks whose earlier merger was thrown out by the Supreme Court to reinstitute their application and have it acted upon under the new standards of the new law without prejudice by reason of the earlier proceedings. It is not often that Congress specifically overrules a Supreme Court decision. Section 3 makes it clear that the 1966 amendment does so.

[85] 112 Cong. Rec. 21838.

This invitation by Congress to the Philadelphia banks, whose proposed merger resulted in the opinion upon which the appellant relies almost exclusively, and the specific overruling of that opinion, supports the position that, at the minimum, the competitive test has been substantially modified.

The Effect of the Command of a Percentage of a Market Varies With the Setting in Which That Factor Is Placed

The Bank Merger Act of 1966 (Section 2(b)) specifies that the *substantive rule of law* to be applied in those merger cases in which litigation was initiated between June 16, 1963 and the passage of the Act was to be the standard articulated in paragraph (5)(B), the competitive effect as balanced by convenience and needs.

As the case presented by the appellant was insufficient when subjected to attack, to sustain the contention either that the Trust Company was a substantial competitor, or that competition was adversely affected or substantially lessened,[86] the court below concluded that the 1966 Act permitted, at least, an analysis of the instant merger on the basis of all of those facts which related to its competitive ability.

These facts, many of which have been recited previously, compel the conclusion that the Trust Company just was not a competitor.

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[86] Except for one witness, a student economist, who conceded the existence of keener competition in Nashville as a result of the merger but who felt that it would disappear sometime in the future (R. 918), the appellant made no serious attempt to prove a probable substantial anti-competitive effect. At the risk of being repetitious, *not one fact* was introduced to show harm to any customer, stockholder or competitor as a result of this merger.

Columbia Steel, as this Court indicated in *Lexington,*[87] was limited to its own facts. Yet, although comment on *Lexington* is in almost unanimous agreement that it sounded the death knell for *Columbia Steel,* we submit that this Court did not hold, in that or any other case, that no defense based upon factors other than statistics is available in a merger of two firms located in the same market. And, it was not error for the lower court to view the Bank Merger Act of 1966 in the light of the facts of this case and to judge all of the factors pertaining to the competitive ability of Trust Company. In so doing it was reasonable for the Court to adopt the competitive test of *Columbia Steel:*[88]

> . . . we do not think that the dollar volume is in itself of compelling significance; we look rather to the percentage of business controlled, the strength of the remaining competition, whether the action springs from business requirements or an intent to monopolize, the probable development of the industry, consumer demands, and other characteristics of the market.

The opinion of the District Court (R. 84) logically applied these criteria to the facts in the instant case. To suggest that a court close its eyes and ears to the overwhelming and largely uncontradicted evidence pointing to noncompetitiveness and subscribe instead to the unsupported testimony of "experts" who demonstrated their lack of knowledge of banking generally and of Nashville particularly would be to suggest that the administrative decisions of the appellant are

[87] *U.S.* v. *First National Bank and Trust Co. of Lexington, supra.*

[88] *U.S.* v. *Columbia Steel Co., supra,* at p. 527.

clothed within infallibility, needing only a rubber stamp for their effectuation.

The percentage of the business controlled, whether Third National is considered alone or in conjunction with the other two major banks, has increased by 4.8 per cent (GX-1013, R. 1168) if only commercial banking is considered, and by only 2 per cent (DX-30A) if other financial institutions—loan and sales finance firms, savings and loan associations, and insurance companies—which were measurable statistically at the time of trial [89] and which offered direct and vigorous competition to all banks in the area, are weighed.

In considering the strength of the remaining competition, the lower court had before it a record in which virtually every witness, whether for the appellant or the appellees, who had knowledge of the Nashville market and who addressed himself to the issue, agreed that competition had been intensified since the merger. The type of competition existing is not destructive but directed to providing better service to the banking consumer. Moreover, every smaller bank in Nashville has experienced his fastest growth since the merger. (Fdg. 88(b), R. 125)

The merger demonstrates no intent to monopolize; it was a case of business judgment by which non-banker investors succeeded in avoiding extremely serious management and asset problems by insuring that the

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[89] Only five weeks was allowed by the trial court for the intervenor to prepare for trial in this case. The statistics pertaining to dollar volume of Nashville based financial institutions, such as Equitable Securities, were unavailable on such short notice, and the appellee does not attempt to speculate as to the effect that such inclusion would have upon the competitive picture.

deposits of the Trust Company would be utilized, as they had not been before the merger, in the service of the economy of a growing and capital-hungry region. Third National had no merger history since its inception and it did not advance its relative position in the market by the merger. There is no proof—or speculation—by the appellant that the instant merger will be the forerunner of others.

The industry has developed too slowly to meet the capital needs of the area. There is not a single bank or other financial institution in the entire Central South which is able to meet the needs of the major corporations located there. (R. 619) The growth of Nashville institutions for at least thirty years has been internal with one previously-cited exception. The continued deterioration of the Trust Company would have necessitated a rescue operation in due course. In a growth area, the Trust Company was losing ground statistically and was too weak internally to correct its situation.

The record is uncontradicted that the basic consumer needs and demands in this area are for commercial lending. Trust Company was unequipped to meet such a demand.[90] It is equally clear that Third National is able and eager to meet these needs to the maximum degree consistent with liquidity requirements.

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[90] Even many of the Trust Company's "commercial loans" were secured by real estate. It did not have the competence to handle unsecured lines. Because of its lack of know-how it had to refuse a $500,000 line of credit to a mortgage broker whose creditworthiness was undisputed. (Fdg. 248, R. 149).

With the record in this case, the court below could reach no other conclusion than that all of these factors pointed in the direction of merger.

This Court, we submit, can assess the *Columbia Steel* factors, *as it did in Lexington,*[91] and reach the same conclusion as the court below.

The reasoning of the district court, whether or not *Columbia Steel* should be applicable case law in bank merger cases, should be upheld upon the basis of the *Houston*[92] decision in which this Court indicated that the "rule of reason" would be applicable to bank merger cases.

It is respectfully submitted that this Court has had no government-instituted antitrust case before it in fifteen years to which the rule of reason is more applicable, or to which the application of the rule commands the conclusion that this merger, in its unique setting, did not result in the elimination of economically significant or substantial competition.

Finally, during the consideration of new bank merger legislation by the Congress, the Department of Justice advised Congress of its willingness to subscribe to the use of the various banking standards in determining the effect of a bank merger upon competition, rather than to rely upon mere concentration percentages. This is demonstrated in a proposed re-

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[91] In *Lexington,* this Court articulated its rule regarding the merger of two substantial competitors only after reciting the *Columbia Steel* factors and concluding, at p. 672:

> In the present case, all these factors clearly point the other way.

[92] *Supra,* p. 369.

vision of subsection (5) of H.R. 11011[93] which was submitted by the Attorney General to Congressman Reuss in a letter dated January 5, 1966.[94] The proposed revision retained the Ashley-Ottinger provision that the courts and agencies should apply identical standards; and it further directed that such items as the financial history and condition of the banks, the adequacy of their capital structure, and future earnings prospects, and the general character of their management, should be taken into account by the banking agency *"in determining the effect upon competition. . . ."* It is application of this concept, subscribed to by the Department of Justice, the appellant herein, which fully justifies the utilization by the district court of the criteria employed in its consideration of this case.

We respectfully submit that the findings of the district court in this case conclusively demonstrate that the Trust Company was not a major or substantial competitor in the Nashville banking market; and that these findings were based upon a preponderance of evidence, almost all of which was factually uncontradicted at trial by the plaintiff; that there has been an increase in the vigor of bank competition in Nashville as a result of the merger; and that the findings as to competition were fully consonant with the case law and statutes governing bank mergers.

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[93] This is the predecessor of the "Ashley-Ottinger Bill."

[94] Appendix B.

[94] Appendix B.

The Convenience and Needs of the Community Are Served by the Merger

What are "convenience and needs"?

In the course of the trial, the appellant discounted every "convenience and needs" factor presented by the appellees except to equate each such factor with "competition." If the factor affected only 14,000 persons (TR. 2510), this was not the "community" envisioned by the 1966 Act. Such an interpretation of the phrase ignores the years of application of this standard by banking and other regulatory agencies in their statutory obligation to determine the public interest.

In the banking field, regulatory agencies have historically considered the convenience and needs of the community in passing upon charter and branching applications, as well as upon mergers. The convenience and needs test includes consideration of such matters as the need for additional banking service; whether a proposed location will be conveniently available to the public it proposed to accommodate; whether the addition of a banking office will affect the soundness of the present bank (if a branch) or other banks in the community (if a charter); whether existing institutions are in fact serving the public through effective and reasonable lending policies, office facilities such as drive-in windows, adequate banking hours; and the competitive factor in the area involved.

The poor competitive posture of Trust Company in this case is sufficient, under the liberalized tests of the Bank Merger Act of 1966, to justify the instant merger. Assuming, however, that the inferences drawn from the appellant's controverted statistics have not

been sufficiently overcome by the facts relating to the lack of competitive ability of Trust Company, we submit that any remaining traces of anticompetitive effect are overwhelmingly outweighed by the contribution of this merger to the convenience and needs of Nashville and the Central South.

Instead of a single branch, each customer of Trust Company now has available the entire branching system of Third National. Of course, if this logic were followed to its extreme conclusion, one could suggest that if all of the banks in Nashville merged, all of the branches would be available to all of the people. As many of the branches of other banks were in direct competition with each other in the same shopping centers (R. 304), the extension of convenience to their customers through merger would not occur. In this case, however, Trust Company had not established branches in an area marked by branching and it apparently had no disposition to do so. Its customers were deprived of this convenience; they are now utilizing Third National branches throughout the city.

The salaries of the employees of Trust Company, by appellant's own evidence, were the lowest among Nashville banks and less than the federally recognized poverty level. (GX-1023, R. 1177) The officer salaries were similarly below the larger banks in the area. (GX-1023, R. 1177; TR. 826-827) Testimony is uncontradicted that *every* Trust Company employee received an increase in salary subsequent to the merger. (TR. 2510; Fdg. 196(f), R. 142) Officers pay scales were adjusted to Third National's higher levels but, more importantly, these individuals were given an opportunity to prove themselves and to advance in a modern, forward looking, aggressive organization.

Trust Company employees who had been dependent upon the board of directors from year to year to finance pensions were given the benefit and security of Third National's funded pension plan. (Fdg. 196(f), R. 142)

The appellant questioned in the court below that benefits to employees constitute benefits to the community. (R. 416) It is respectfully submitted that the payment of a living wage and the granting of an opportunity to progress to an individual whose horizons had been severely circumscribed constitute contributions to the convenience and needs of the community which are as important as any we can conceive.

The administration of the trust department of Trust Company, as noted heretofore, was severely criticized by FDIC examiners as being guilty of condoning violations of the law and self-dealing transactions (Fdgs. 152-159, R. 135-136) and by experienced regulators of permitting the continuation of gross improprieties. (R. 806) The record below is uncontradicted that Third National had an excellent trust department which, in terms of plant, personnel, and investment expertise had been able to provide its customers and those of the Trust Company with superior service. It was able to correct, in the months subsequent to the merger, the aforementioned improprieties (Fdg. 162, R. 137) which the Trust Company had been unable or unwilling to correct—indeed, had permitted to expand—over an undetermined number of years.

There are a number of other community benefits which stem from this merger and which have been defined in the opinions and findings of the court below. These include the fact that a fully automated

operation has been made available to customers of the Trust Company (Fdg. 196(d), R. 141); that the important financial contacts inherent in a well-developed correspondent system are also available to those customers (Fdg. 196(e), R. 141-142); the Trust Company building has been completely remodeled and made serviceable (Fdg. 197(a), R. 142); the stronger capital position of Third National serves as greater protection to Trust Company depositors and also as a base to support further expansion as the needs of the community require (Fdg. 197(d), R. 142); the efficient auditing of Trust Company resources offers better protection against defalcations. (Fdg. 197(g), R. 142)

A larger ~~legal~~ lending limit, which has been increased as a result of this merger (Fdg. 196(b), R. 141), will enable Third National to serve the needs of its merger customers with less dependence upon money center banks in New York, Philadelphia and Chicago. (R. 611) It will also enable the bank to approach its lending limit more frequently (TR. 2808) in the extension of credit to firms located in the Central South which require these credits (R. 611) and the financial expertise (TR. 1844-45) available from Third National for expansion of plant, production, and payroll. (R. 648; R. 771-772; R. 831)

Each of the foregoing, whether separately or in combination, would be sufficient for the approval of this merger on the grounds of a contribution to the convenience and needs of the community. Indeed, it is one of the most pressing concerns of the bank's regulatory agency, and particularly that of the Office of the Comptroller of the Currency, that so many

banks which operate as private investment trusts for the benefits of the stockholders, are niggardly with regard to their employees both in terms of salary and in fringe benefits. There is little justification for the continued existence of a bank which is not contributing to the economy of its community through judicious lending and whose profit is maintained by the deprivation of a living wage or economic security to its employees. The Trust Company was not atypical; more than 40 per cent of the nation's banks do not have adequate pension plans for their employees. (R. 836)

The most important benefit to the community in this case is the utilization of the deposits of Trust Company by Third National. As previously noted, the merger resulted in the transfer of funds from long-term mortgage paper and classified loans held by the Trust Company into commercial lending. The amount of the funds thus unfrozen in combination with the larger loan to deposit ratio of Third National added nearly $13,000,000 to the pool of funds available in Nashville and the Central South for commercial landing; this sum is in excess of the amount that the Trust Company was using for commercial and consumer purposes.[95] The lower court found and it is undisputed that the entire Central South was a capital deficit area and sorely in need of such funds. (Fdg. 72, R. 123) An industrialist testified that these funds were essential to the continued growth of his particular firm. (TR. 1841) A small country bank president listed the benefits to his community that resulted from the availability of funds for commercial lending from a larger correspondent bank such as

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[95] *Infra*, p. 15.

Third National. (R. 768; Fdg. 107, R. 128) Whereas the Trust Company had been deliquent in its duty to utilize its funds and its personnel in helping the growth of the economy of this area, Third National had been in the forefront.

As a Return to the Status Quo at the Time of the Merger Is Unthinkable, the Merger Itself Should Be Sustained

It cannot be denied that the possibility exists that a new bank could be created as a result of unscrambling a merger, but it would be at best, a difficult procedure. Indeed, this Curt demonstrated its awareness of the problem that could be created by a divestiture order.[96]

How does one force a depositor or a borrower to start doing business with a new institution when the individuals with whom his banking relationships have been established are not similarly transferred. How does one decide which employees are to be severed from their current employment with a progressive institution in order to gamble their future with an unknown quantity?

In this case, however, another element is present. The Trust Company, its management and its operation, has been exposed to the community because of this trial. A return to the *status quo* at the time of merger would be unthinkable, and it is significant to note that appellant does not request such a drastic remedy.

Yet, if the return to the *status quo* would be so harmful to the community and to the Trust Company, would it be equitable to rule that the absorption of

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[96] *U.S.* v. *First City National Bank of Houston, supra*, p. 370-371.

this institution with all of its defaults and deficiences was illegal? We think not.

CONCLUSION

It is respectfully submitted that (1) Trust Company was not a significant competitive factor in Nashville at the time of this merger because of the failure of its management to supply it with the personnel, equipment and the procedures which would have enabled it to be competitive with the other institutions in the area; and,

(2) the anticompetitive inferences which might be drawn, if this merger is judged solely upon the controverted statistics presented by the appellant, was clearly outweighed in the public interest by the merger's contribution of the convenience and needs of the community to be served including the increase in competition among surviving Nashville institutions. We respectfully request that the decision of the court below be affirmed.

Respectfully submitted,

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